

# Regulating the Deficit After *Bowsher v. Synar*

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*"When a great question is first started, there are very few . . . minds, which suddenly and instinctively comprehend it in all its consequences."*

— John Adams<sup>1</sup>

Although acknowledging that "Gramm-Rudman-Hollings"<sup>2</sup> was enacted "to meet a national fiscal emergency . . . of unprecedented magnitude,"<sup>3</sup> in *Bowsher v. Synar*<sup>4</sup> the Supreme Court nevertheless declared its key provision unconstitutional.

Section 251 of Gramm-Rudman-Hollings<sup>5</sup> directed the Comptroller General to prepare a report to the President and Congress specifying program-by-program budget reductions necessary to prevent the deficit for the coming fiscal year from exceeding the maximum permitted by the statute.<sup>6</sup> Seven justices agreed that this provision violates the Constitution.<sup>7</sup>

The goal of this Article is to assess where we stand in the war against the deficit after *Bowsher v. Synar* and to suggest an alternative approach for regulating the deficit in the wake of the Supreme Court's decision. The Article has four Parts. Part I summarizes and criticizes the decision in *Bowsher v. Synar*. The conclusion is that the Supreme Court overlooked the key constitutional issue posed by the statute: whether the President may be compelled to follow the Comptroller General's ruling regard-

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1. Quoted in C. BOWEN, *MIRACLE AT PHILADELPHIA: THE STORY OF THE CONSTITUTIONAL CONVENTION MAY TO SEPTEMBER 1787* 94 (1966).

2. Balanced Budget and Emergency Deficit Control Act of 1985, Pub. L. No. 99-177, 99 Stat. 1038, 2 U.S.C.A. §§ 901-922 (West Supp. 1986) [hereinafter cited by its popular name, "Gramm-Rudman-Hollings," for its three principal sponsors].

In general terms, Gramm-Rudman-Hollings sets "maximum deficit amounts" for each fiscal year from 1986 through 1991. The size of the maximum deficit amounts permitted under the statute gradually declines to zero by 1991.

3. *Bowsher v. Synar*, 106 S. Ct. 3181, 3192-93 (1986).

4. 106 S. Ct. 3181 (1986).

5. 2 U.S.C.A. § 901 (West Supp. 1986).

6. Gramm-Rudman-Hollings § 252 purports to allow the President no discretion in making the cuts. See *infra* notes 52-55 and accompanying text.

7. Those justices were Burger, Brennan, Powell, Rehnquist, O'Connor, Stevens, and Marshall.

ing the amounts to be cut from the budget. The Court should have declined to decide that issue at this time, however, since a concrete case had not yet arisen in which the President refused to follow the Comptroller General's recommendation. Instead, the Court should have held that a challenge to the Comptroller General's role under Gramm-Rudman-Hollings was not yet "ripe" in advance of an actual controversy about how the Comptroller General had exercised his functions.

Part II takes a broader view, assessing the significance of *Bowsher v. Synar* from two different perspectives: First, the case is considered as the latest in a line of separation of powers precedents that reflect the current Supreme Court's hostility to innovation in the design of governmental institutions; second, the decision is seen as delivering a major blow to the search for a legal mechanism for dealing with what many consider one of the country's most serious problems—a federal budget deficit that appears to be out of control.<sup>8</sup>

Gramm-Rudman-Hollings was not perfect, but it was the most promising measure yet tried to bring the deficit under control.<sup>9</sup> Consequently, it was regrettable, even irresponsible, for the Supreme Court to go out of its way to gut Gramm-Rudman-Hollings based on a tenuous and speculative separation of powers analysis before giving the statute a fair chance to work.

Part III explores an alternative approach for dealing with the deficit now that the Supreme Court has eviscerated Gramm-Rudman-Hollings. The perspective adopted is original in that the deficit is analyzed as a problem in *regulation*, and one possible cause of the deficit is traced to the incentives created by congressional voting procedures. To modify these incentives, the concept of "Dependent Taxation and Budgeting in Arrears" is proposed as a possible reform.

Part IV is a conclusion that attempts to place Gramm-Rudman-Hollings and *Bowsher v. Synar* in the broader context of the uncertain constitutional status of "framework statutes,"<sup>10</sup> such as the War Powers

8. It is beyond the scope of this Article (and beyond the competence of its author) to assess how serious a policy problem the federal deficit really is. A recent newspaper article reported that many people feel that the federal budget deficit is the most important problem facing the country. Sherman, *Deficit Is a Vital Issue to Voters*, Wall St. J., Oct. 24, 1986, at A1, col. 1. As the Court did in *Bowsher v. Synar*, I assume that Gramm-Rudman-Hollings was enacted to deal with what Congress considered to be a serious national problem.

9. See Elliott, *Constitutional Conventions and the Deficit*, 1985 DUKE L.J. 1077, 1098-1101, 1103-04 (expressing skepticism that Gramm-Rudman-Hollings "really represents decisive action by the Congress to deal with the deficit" but noting that there was a possibility that the statute might "work" because it changed the incentive structure for politicians, albeit in ways that "may not be as desirable" as reforms that might be suggested by constitutional convention).

For a summary of previous unsuccessful attempts to deal with the deficit, see *infra* text accompanying notes 155-56.

10. The term was invented by Gerhard Casper to describe statutes in which Congress purports to

Resolution,<sup>11</sup> which purport to establish procedures for regulating conflicts between branches of government.

## I. The *Bowsher v. Synar* Decision

Hours after Gramm-Rudman-Hollings was signed into law on December 12, 1985, Alan Morrison, litigation director of Ralph Nader's Public Citizen, Inc., filed suit in the name of Oklahoma Congressman Mike Synar seeking a declaratory judgment that the statute was unconstitutional.<sup>12</sup> The National Treasury Employees Union filed a similar suit alleging that Gramm-Rudman-Hollings deprived its members of a scheduled cost-of-living increase.<sup>13</sup> The two suits were consolidated before a three-judge panel of the District Court for the District of Columbia.

In a *per curiam* opinion widely believed to have been principally authored by then-Judge, now-Justice, Antonin Scalia, the District Court rejected the plaintiffs' argument that Gramm-Rudman-Hollings violated the "delegation doctrine."<sup>14</sup> The Court held the statute unconstitutional on the alternative ground that it violated the separation of powers doctrine; by retaining the power to remove the Comptroller General, Congress had created a "here-and-now subservience" of the Comptroller General to Congress that was inconsistent with his exercise of executive

create a procedural framework to regulate future conflicts between the branches of government. See Casper, *Constitutional Constraints on the Conduct of Foreign and Defense Policy: A Nonjudicial Model*, 43 U. CHI. L. REV. 463, 482 (1976).

11. 50 U.S.C. §§ 1541-1548 (1982). Other examples of framework statutes include the Administrative Procedure Act, 5 U.S.C. §§ 551 et seq. and 701 et seq. (1982), and the Congressional Budget Reduction and Impoundment Control Act of 1974, 2 U.S.C. §§ 631-642 (1982).

12. *Synar v. United States*, 626 F. Supp. 1374, 1378 (D.D.C. 1986) (Scalia, Gasch, Johnson, JJ.). Morrison also brought the successful challenge to the legislative veto, *Immigration & Naturalization Service v. Chadha*, 462 U.S. 919 (1983) [hereinafter *Chadha*]. It is ironic that in both cases the "public interest" movement joined forces with the conservative Reagan administration to attack statutory innovations on separation of powers grounds.

The basis for Morrison's position in both cases was shaped by his analysis of the effect of the statute on the power of organized interest groups. In Morrison's view, by increasing the influence of members of Congress over administrative agencies, the legislative veto enhanced the influence of special interest groups such as regulated industries. On the other hand, Gramm-Rudman-Hollings reduced the power of organized constituencies for social spending by transferring the decision to cut social programs from high visibility votes in the Congress to the across-the-board, "automatic" cuts pursuant to Gramm-Rudman-Hollings. Oral statement by A. Morrison, Hofstra University Symposium on the Supreme Court under the Leadership of Chief Justice Burger (Nov. 7, 1985).

13. *Synar v. United States*, 626 F. Supp. at 1378.

14. The conventional understanding of the delegation doctrine is that Congress must prescribe standards to guide administrators in the exercise of delegated law-making powers. See *Industrial Union Dep't, AFL-CIO v. American Petroleum Inst.*, 448 U.S. 607, 675 (1985) (Rehnquist, J., concurring). In recent years, the doctrine has fallen into disuse and has been strongly criticized. See Mashaw, *Prodelegation: Why Administrators Should Make Political Decisions*, 1 J.L. ECON. & ORG. 81 (1985).

powers.<sup>15</sup> The Supreme Court granted expedited consideration of a direct appeal<sup>16</sup> and affirmed.

#### A. *The Supreme Court Opinions*

According to then-Chief Justice Burger's majority opinion for himself and four other justices, Section 251 of Gramm-Rudman-Hollings violated the Constitution because

[b]y placing the responsibility for execution of the Balanced Budget and Emergency Deficit Control Act in the hands of an officer who is subject to removal only by itself, Congress in effect has retained control over the execution of the Act and has intruded into the executive function.<sup>17</sup>

Justice Stevens, in an opinion joined by Justice Marshall, concurred in the judgment, but not in Chief Justice Burger's opinion. According to the two concurring justices, Congress's retention of statutory authority to remove the Comptroller General—a power which has never actually been used<sup>18</sup>—did not, in and of itself, establish the "legislative" character of that office. Instead, Justices Stevens and Marshall canvassed the Comptroller General's "existing statutory responsibilities"<sup>19</sup> as well as "the historic conception of the Comptroller General's office"<sup>20</sup> and determined that the Comptroller General is an "agent" of Congress.<sup>21</sup> Then, relying on the legislative veto decision, *INS v. Chadha*,<sup>22</sup> the concurring opinion concluded that

[E]ven though it is well settled that Congress may delegate legislative power to independent agencies or to the Executive, and thereby divest itself of a portion of its lawmaking power, when it elects to exercise such power itself, it may not authorize a lesser representative of the Legislative Branch to act on its behalf.

. . . As we emphasized in *Chadha*, when Congress legislates, when it makes binding policy, it must follow the procedures prescribed in Article I. . . . through enactment by both Houses and presentment to the President.<sup>23</sup>

15. *Synar v. United States*, 626 F. Supp. at 1392.

16. 106 S. Ct. at 1181.

17. 106 S. Ct. at 3192.

18. *Id.* at 3195 (Stevens, J., concurring).

19. *Id.* at 3196-99.

20. *Id.* at 3197.

21. *Id.* at 3199.

22. 462 U.S. 919 (1983) (one house veto struck down because Article I of Constitution requires legislative action to be passed by majority of both Houses and presented to President).

23. 106 S. Ct. at 3205 (footnote omitted) (Stevens, J., concurring).

The rationale of the concurrence represents a potentially significant expansion of *Chadha*, which most observers (including the present author) read as permitting Congress to create institutions that exercise lawmaking powers without following the procedures for bicameral enactment and presentment to the President which the Constitution requires of Congress itself.<sup>24</sup> Under the reasoning of the *Bowsher v. Synar* concurrence, if another institution is deemed an “agent” of Congress, *Chadha* applies.

Two justices dissented in *Bowsher v. Synar*. Justice White, as he had in *Chadha*, condemned the majority’s “distressingly formalistic view of separation of powers.”<sup>25</sup> The bulk of Justice White’s dissent was surprisingly narrow, however, focusing on whether the particular office of the Comptroller General is independent, or under the control, of Congress. On the more significant issue for separation of powers cases generally—whether the concept of an “executive” function should be expanded to encompass activities such as those performed by the Comptroller General under Gramm-Rudman-Hollings—Justice White actually conceded that the majority was correct:

*I have no quarrel with the proposition that the powers exercised by the Comptroller under the Act may be characterized as “executive” in that they involve the interpretation and carrying out of the Act’s mandate. . . . I cannot accept, however, that the exercise of authority by an officer removable for cause by joint resolution of Congress is analogous to the impermissible execution of the law by Congress itself, nor would I hold that the congressional role in the removal process renders the Comptroller an “agent” of the Congress, incapable of receiving “executive” power.*<sup>26</sup>

In Justice White’s eyes, “The practical result of the removal provision is not to render the Comptroller unduly dependent upon or subservient to Congress, but to render him one of the most independent officers in the entire federal establishment.”<sup>27</sup>

The second dissent, by Justice Blackmun, argued that, rather than “striking down the central provisions of the Deficit Control Act,” the Court should have invalidated the “cumbersome, 65-year-old removal

24. Elliott, *INS v. Chadha: The Administrative Constitution, the Constitution and the Legislative Veto*, 1983 SUP. CT. REV. 125, 159-60 (1984); see also Ginnane, *The Control of Federal Administration by Congressional Resolutions and Committees*, 66 HARV. L. REV. 569, 595 (1953) (requirements of presentment and bicameral action do not apply to institutions other than Congress).

25. 106 S. Ct. at 3205 (White, J., dissenting).

26. *Id.* at 3209 (White, J., dissenting) (emphasis supplied).

27. *Id.* at 3213 (White, J., dissenting).

power that has never been exercised and appears to have been all but forgotten until this litigation."<sup>28</sup>

### B. *The Issues the Court Overlooked*

The Supreme Court overlooked several issues in *Bowsher v. Synar*. First, the Court failed to pay sufficient attention to the Comptroller General's actual function under Gramm-Rudman-Hollings. Second, the Court overlooked the important constitutional issue of whether the Comptroller General can bind the President. Third, the Court failed to appreciate the dangers of ruling on a challenge to the Comptroller General's role under Gramm-Rudman-Hollings before the issue had "ripened" into a concrete controversy which would clarify the actual relationship of various actors under the statute.

#### 1. *Is the Comptroller General's Function "Executive"?*

The primary point on which the various opinions joined issue is how the relationship between the Comptroller General and Congress should be characterized. If that had been the central issue which the Court should have decided in *Bowsher v. Synar* (a point which this Article disputes), then the concurrence probably had the best of the argument.

As the Court framed the issues, it was required to take on the difficult task of predicting how the Comptroller General would have behaved in the future: would the Comptroller General have been the lackey of Congress (as the majority feared), or would he have exercised his duties with the kind of independent professionalism that Justice White foresaw? Unfortunately, this is the wrong question for the Court to have asked in *Bowsher v. Synar*, and no good answers are yet possible. In advance of actual experience under the statutory scheme, it is extremely difficult to predict whether the Comptroller General would actually have been subject to the "here-and-now subservience to another branch" that the Court feared.<sup>29</sup>

Courts are not well-suited for predicting how government officials will behave in the future.<sup>30</sup> Armed only with traditional legal tools, a court cannot possibly foresee the many factors that may influence the way an

28. *Id.* at 3315 (Blackmun, J., dissenting).

29. 106 S. Ct. at 3189 n.5 (quoting *Synar v. United States*, 626 F. Supp. 1374, 1392 (D.D.C. 1986)).

30. *Cf. Dennis v. United States*, 341 U.S. 494, 562, 570 (1951) (Jackson, J., concurring) (urging rejection of "clear and present danger test" in context of subversive organizations, because Court would have to "appraise imponderables, including international and national phenomena which baffle the best informed foreign offices and . . . most experienced politicians. . . . No doctrine can be sound whose application requires us to make a prophecy of that sort in the guise of a legal decision.").

official will discharge his duties. The court can, of course, analyze the formal legal structure within which the official functions—the wording of the statutory mandate, the terms of the provisions for removing the official, and so on. But this kind of formal statutory analysis frequently misleads for the simple reason that the formal legal structure comprises only a small, and often an insignificant, part of the total system of incentives that may influence a government official's behavior.

Then-Chief Justice Burger's opinion for the majority in *Bowsher v. Synar* is a classic example of this pitfall. Burger attempted to predict how subservient the Comptroller General would be in exercising his authority under Gramm-Rudman-Hollings by focusing exclusively on the existence of Congress's statutory power to remove the Comptroller General for permanent disability, inefficiency, neglect of duty, malfeasance, or felony,<sup>31</sup> a power that has never actually been invoked.<sup>32</sup> Perhaps Burger was correct that the threat of removal for inefficiency would hang like the sword of Damocles over the head of the Comptroller General, biasing his every action. But perhaps that is really not the case at all. Perhaps the real political and institutional situation is that, as a practical matter, the Comptroller General could not possibly be removed merely because certain members of Congress disagreed with his actions on a particular issue.

The important point is not which of these two scenarios is more realistic, but that courts are not in a position to distinguish between the two. The Comptroller General may enjoy great independence and freedom of action in practice, whatever the wording of the terms of the removal statute. From the naked words of the statute defining the legal grounds for removal, a court will find it impossible to surmise correctly whether the threat of removal has a substantial effect on an office-holder's performance.<sup>33</sup>

Recognizing these flaws in the majority's approach, Justice Stevens's concurrence sought to broaden the frame of reference to take into account other factors, such as the Comptroller General's other statutory responsibilities and the "historic conception of the Comptroller General's office."<sup>34</sup> This is helpful, but only to a degree. Undoubtedly, the factors the concurrence considered are part of the overall system of incentives that affects an incumbent's exercise of his powers. Ultimately, however, the concurrence's approach is only marginally better than the majority's, since it too is able

31. 31 U.S.C. § 703(e)(1)(B) (1982).

32. See *supra* text accompanying note 18.

33. Perhaps because they have life tenure themselves, Article III judges may tend to exaggerate the importance of statutes defining the terms of removal.

34. 106 S. Ct. at 3197 (Stevens, J., concurring).

to grasp only a small fraction of the totality of factors that may affect how office-holders actually perform their functions.

Judges simply are not very good political scientists when it comes to predicting the future behavior of government officials. Indeed, even the best political scientists are not very good at predicting the future behavior of officials; the game is simply too complicated. This is one reason why courts should—and generally do—wait until issues are actually presented in the factual setting of a concrete case, rather than let themselves be drawn into speculating about future events.<sup>35</sup>

In the final analysis, a court simply has no business trying to use traditional legal materials to predict how an officer will function in the future (unless it absolutely cannot avoid doing so, a circumstance that I cannot presently imagine). None of the opinions in *Bowsher v. Synar* succeeds in developing a convincing basis for guessing how “subservient” to Congress the Comptroller General would have been in exercising his functions under Gramm-Rudman-Hollings.

Moreover, the Court’s unproductive debate about whether to characterize the Comptroller General as “legislative,” “independent,” or an “agent” of Congress caused it to lose sight of a far more important issue: the nature of the Comptroller General’s actual functions under Gramm-Rudman-Hollings. The majority’s so-called analysis of why the Comptroller General’s role under the statute should be deemed executive (which even Justice White does not dispute) was almost laughable in its simplicity:

Appellants suggest that the duties assigned to the Comptroller General in the Act are essentially ministerial and mechanical so that their performance does not constitute “execution of the law” in a meaningful sense. On the contrary, we view these functions as plainly entailing execution of the law in constitutional terms. *Interpreting a law* enacted by Congress to implement the legislative mandate is the very essence of “execution” of the law. Under Sec. 251, the Comptroller General must *exercise judgment concerning facts that affect the application of the Act*. He must also *interpret the provisions of the Act* to determine precisely what budgetary

35. See *United Pub. Workers v. Mitchell*, 330 U.S. 75, 89-91 (1947) (federal employees’ suit against Civil Service Commission to prohibit Hatch Act enforcement presented no case or controversy since it asked court to speculate on future political activity employees might engage in); A. BICKEL, *THE LEAST DANGEROUS BRANCH* 146-47 (1962) (summarizing reasons courts should decide legal issues only in context of actual, concrete controversies); see also *Rizzo v. Goode*, 423 U.S. 362 (1976) (no case or controversy presented by civil rights claim based on what policeman employed by respondents might do in future); *O’Shea v. Littleton*, 414 U.S. 488 (1974) (no case or controversy presented by civil rights claim based on speculation that named plaintiff in class action might be charged with crime and subjected to discriminatory practices).



calculations are required. Decisions of that kind are typically made by officers charged with executing a statute.<sup>36</sup>

The Court certainly is correct that the Comptroller General's functions would not be "ministerial" or "mechanical" in *some* cases that might be imagined as arising under the Act,<sup>37</sup> but as a matter of simple logic, that fact does not imply that the Comptroller General's functions are necessarily "executive." Many "executive" functions are "ministerial"; others are not. One thing says very little about the other.

The Court mentioned only two other factors in determining that the Comptroller General's functions are executive: (1) that the Comptroller General must *interpret* the law; and (2) that he must exercise judgment concerning relevant *facts*. Coming from anyone other than the Supreme Court, this analysis would instantly be seen as shallow and unproductive.

One would have thought that interpreting law and applying it to facts was the essence of a judicial, not an executive function. The primary point is not that the Court errs in considering the Comptroller General's tasks under Gramm-Rudman-Hollings executive, rather than judicial. (It is worth noting in passing, however, that the Comptroller General's actual functions under Gramm-Rudman-Hollings probably are more judicial than executive,<sup>38</sup> and that if these functions were analyzed under precedents concerning Article I "legislative courts," the Comptroller General's role under Gramm-Rudman-Hollings might well be found constitutional.<sup>39</sup>) The more important point, for the moment, is that the test for

36. 106 S. Ct. at 3192 (emphasis supplied).

37. The degree of discretion the Comptroller General exercises in making his report will vary from instance to instance. His role is essentially that of an arbitrator who is called upon to resolve the differences between the initial estimates of the deficit submitted by the Office of Management and Budget and the Congressional Budget Office. Depending upon the nature of the particular disagreements of fact or statutory interpretation, if any, which are raised in a particular instance, the Comptroller General's duties may be highly discretionary, or relatively simple and straightforward. In the one instance in which the Comptroller General actually made a report which formed the basis for sequestrations by the President, the issues were relatively clear and straightforward. See 51 Fed. Reg. 4291 (Feb. 4, 1986). The fact that the nature of the Comptroller General's task may vary from instance to instance provides another reason that the Court should wait for a concrete case before ruling on the constitutional issue.

38. The Comptroller General is charged with preparing a report which resolves the differences between deficit estimates made by the Congressional Budget Office and the Office of Management and Budget. Gramm-Rudman-Hollings § 251(b)(1), 2 U.S.C.A. § 901(b)(1) (West Supp. 1986). The Comptroller General's report does not actually *do* anything in and of itself, see *infra* text accompanying notes 51-52. Instead it establishes the "law" that the President is duty bound to follow in sequestering funds.

It is the essence of the judicial function to resolve disputed issues of law and fact, thereby establishing an authoritative standard which the Executive is duty bound to follow in executing the laws.

39. A long line of cases has recognized the power of Congress to assign judicial functions in certain areas to specialized tribunals created under Article I, rather than to Article III courts. See, e.g., *Atlas Roofing Co. v. Occupational Safety & Health Review Comm'n*, 430 U.S. 442, 450 (1977) (assignment to administrative agency task of adjudicating violations of Occupational Safety & Health

determining "executive" functions announced by the Court in *Bowsher v. Synar* is utterly vapid and without content.

In a government of laws, by definition, *every* employee of the government must "interpret" laws and "exercise judgment concerning facts" to apply the law to specific situations. The Supreme Court itself, in reaching its decision in *Bowsher v. Synar*, satisfies the test it announces there for performing an "executive function," since it too must "interpret law" and "exercise judgment concerning facts that affect the application of the Act." Indeed, the obligation to interpret law and apply it to facts is not limited to governmental officials; every citizen must "interpret" law and "determine facts" in order to conform his or her conduct to the dictates of the law.

The Court's approach is flawed not simply because the particular definition of "executive" action that it proposes is shallow and unhelpful. A more fundamental jurisprudential error underlies the Court's whole philosophy of trying to decide separation of powers issues by developing definitions of concepts such as "executive" action. The Court's attempt to develop a jurisprudence of conceptual definitions in separation of powers cases necessarily proceeds from the premise that concepts like "executive" action are sufficiently coherent and powerful that by defining these concepts, issues such as whether the officer performing certain functions must be subject to presidential control can be resolved. However, this premise is dubious for two independent reasons: first, it simply may not be possible to devise a comprehensive, rigorous, analytic definition of "executive" action, and secondly, even if it were possible, the definition probably would not have sufficient power to resolve the variety of subtle separation of powers issues that arise.

The majority opinion in *Bowsher v. Synar* apparently assumes as self-evident that because the term "executive Power" is used in the Constitution, one must be able to define it. But the fact that the Constitution uses a concept such as the "executive Power" does not imply that these words are necessarily susceptible of a sharp-edged analytic definition. On the contrary, many of the Constitution's "broad and majestic concepts" do not

Act constitutional). Article I tribunals may adjudicate certain kinds of "public rights." *Northern Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 68 (1982) (recognizing public-rights doctrine as based on distinction between matters that could be conclusively determined by the executive and legislative branches and matters that are 'inherently . . . judicial' (citations omitted) but holding that bankruptcy courts do not fall within that exception); *Crowell v. Benson*, 285 U.S. 22, 51 (1932) (upholding fact finding by deputy commissioner under Longshoremen's and Harbor Workers' Compensation Act; cataloging some of the matters that fall within public-rights doctrine: "interstate and foreign commerce, taxation, immigration, the public lands, public health, the facilities of the Post Office, pensions and payments to veterans"). While the rationale for and scope of the public-rights exception is less than crystal clear, it seems likely that the function performed by the Comptroller General under Gramm-Rudman-Hollings would fall within it.

have precise, fixed definitions, but were "purposely left to gather meaning from experience."<sup>40</sup>

"Executive" action probably should be thought of as an evolving concept, like "due process," "property," or "privacy," for which no fixed, comprehensive analytic definition is possible. When the Framers of the Constitution vested the "executive Power" in the President, they undoubtedly had a general idea in mind, probably something like "those managerial functions of government which are not legislative (law creating) or judicial (rights defining) in nature." But it simply does not follow that because the Constitution uses a term like the "executive Power" that the term must have a fixed, definitive meaning that will resolve all controversies concerning what is included and what is excluded. On the contrary, it seems much more likely that the Framers intended to leave it to subsequent political history to work out the details of which functions were to be performed by the executive, as opposed to the legislative and judicial branches.<sup>41</sup>

Consider the example of issuing detailed rules to regulate the economy. Today this is regarded as an "executive" function.<sup>42</sup> But it is not productive to think that rulemaking "is" (and always was) executive because it came within the one true and correct definition of "executive" that the Framers had in mind. Rather, we should recognize that rulemaking has *become* an executive function because, as the three branches evolved, the rulemaking function fit with the characteristics that the executive branch had developed and it was not inconsistent with the roles of the other branches for the executive to perform this function.

The Court in *Bowsher v. Synar* probably took on an impossible task when it set out to write a simple, comprehensive, and yet definitive definition of executive action. But even if it were possible to define "executive" action, it would not follow that applying definitions of concepts would be the best way to decide separation of powers cases.<sup>43</sup> The constitutional theory of separation of powers is by its nature holistic; it draws its meaning from the totality of the structures created by the Constitution and the history of how our institutions have evolved. No simple definition, no matter how well-crafted, can encapsulate all the wisdom implicit in the structure of the Constitution and our political history. By resorting to a

40. Board of Regents of State Colleges v. Roth, 408 U.S. 564, 571 (1972).

41. See generally Powell, *The Original Understanding of Original Intent*, 98 HARV. L. REV. 885 (1985) (framers of Constitution did not intend their understanding of terms to bind later generations).

42. See *Chadha*, 462 U.S. at 953 n.16.

43. Cf. Henkin, *Privacy and Autonomy*, 74 COLUM. L. REV. 1410, 1429-30 (1974) (definition of "privacy" is not helpful for deciding cases which balance individual's interest in autonomy against community's conception of public good).

jurisprudence of definitions, the Court inevitably oversimplifies the issues in separation of powers cases.

While a complete definition of the "executive" function is probably impossible, enough can be said about some of the characteristics that are necessary (but not sufficient) to establish that a function is inherently executive to demonstrate that the Comptroller General's functions under Gramm-Rudman-Hollings should not fall into that category. The Court's proposed test for determining whether an action is executive focuses on whether an official must interpret law and determine facts in the course of his duties.<sup>44</sup> This asks the wrong questions. When determining whether a governmental action is so inherently executive in nature that it cannot constitutionally be assigned to an official outside the executive branch, the primary focus should not be on the process that leads up to the action, but rather on the effect of the action taken.<sup>45</sup> To "execute" the laws is to "put [them] into effect: to carry [them] out fully and completely."<sup>46</sup> To qualify as activity that is inherently executive in nature, at a minimum something must be the final, completed act of the government.

Consider a traditionally executive function, such as prosecuting crimes.<sup>47</sup> The actions of a prosecutor are "executive," not because in the course of her duties a prosecutor interprets law and applies it to facts (although she may); but rather because the prosecutor acts as and for the United States in carrying out a managerial function of government—law enforcement—that has traditionally been performed by the executive branch.<sup>48</sup> The prosecutor's actions are the completed actions of the United States as a whole, not merely the act of a component part that precedes action by the United States.<sup>49</sup>

44. See *supra* text accompanying notes 36-39.

45. Cf. *Chadha*, 462 U.S. at 952 (action is legislative because it has effect of "altering legal rights").

46. WEBSTER'S THIRD INTERNATIONAL DICTIONARY 794 (1981); see also BLACK'S LAW DICTIONARY 509 (5th ed. 1979): "Execute. To complete; . . . to perform; to do . . . ."

47. The acknowledgment in the text that prosecuting crimes has traditionally been regarded as an executive function is not intended to imply that statutes creating "independent special counsels" are unconstitutional.

48. See *Watkins v. United States*, 354 U.S. 178, 187 (1957) (Congress is not "law enforcement or trial agency. These are functions of the executive and judicial departments of the government.").

49. Until recently, the Supreme Court wisely refrained from attempting to define an "executive" function. Some support for the approach advocated in the text can be found, however, in the dissent by Justices Holmes and Brandeis in *Springer v. Philippine Islands*, 277 U.S. 189, 209 (1928) (Holmes, J., dissenting). *Springer* involved the voting of stock in certain corporations set up by the government of the Philippine Islands, then a U.S. territory. In a superficial opinion, the majority held that to vote stock was inherently executive in nature, and therefore that this action could not be performed by members of the legislative branch. The dissent, by Holmes and Brandeis, probes far deeper into the logic of separation of powers considerations under our Constitution. Holmes and Brandeis would not have held that voting the stock was an executive function for the reason that the "corporation[s] did not perform functions of the Government." 277 U.S. at 211. This supports the view advocated in the text that actions are executive only if they are final actions taken by and for the United States.

It must be stressed that not every completed action by the United States is therefore "executive." In a sense, a decision by the Supreme Court, or a vote by the Congress to override a veto, represents completed action by the United States. The point is the converse: *unless* an action is the completed action of the United States, it cannot qualify as so inherently an executive function that it cannot be performed by any other branch of government.

Unfortunately, the *Bowsher v. Synar* Court did not grasp this point, and, as a result, its test for determining when actions are "executive" perpetuates a fundamental misunderstanding of what constitutes an exercise of executive power under the Constitution. The Constitution does mandate that the President "shall take care that the Laws be faithfully executed,"<sup>50</sup> but this phrase does not purport to be a definition of the executive function. The fact that the President has an explicit obligation to execute the laws faithfully cannot mean that every time another government official faithfully "executes" a law, in the sense of obeying its commands in the course of his or her governmental duties, that official thereby becomes involved in an exercise of exclusively "executive" powers. For example, a district court judge is duty-bound to follow the dictates of the law in ruling on a case arising from the Freedom of Information Act, and in this sense, the judge must "execute" the law's commands. But the fact that a judge acts pursuant to the command of law (and, therefore, must interpret law and apply it to facts) does not convert the judicial enterprise into an executive one. A governmental action is "executive" because of the nature of its effect, not because it is in obedience to the command of law.

## 2. *The Comptroller General and the President*

In assessing whether the Comptroller General's functions under Gramm-Rudman-Hollings are functions which the Constitution requires be performed only by an officer subject to presidential removal, the Supreme Court should have paid closer attention to the actual provisions of the statute. Under Section 251(b) of Gramm-Rudman-Hollings, the Comptroller General is charged to prepare a report to the President and Congress outlining his interpretation of the budget cuts required to meet the maximum deficit targets of the statute.<sup>51</sup> Significantly, however, the Comptroller General's report does not, in and of itself, actually sequester appropriated funds. It is not the completed act of the United States. On the contrary, the statute specifically provides that a further step—action

50. U.S. CONST. art. II, § 3, cl. 4. A separate clause of the Constitution vests "the executive Power" in the President. U.S. CONST. art. I, § 1, cl. 1.

51. 2 U.S.C.A. § 901(b) (West Supp. 1986).

by the President—is necessary to carry into effect the sequestration of funds mandated by Gramm-Rudman-Hollings.<sup>52</sup> Thus, the Comptroller General's report would not have "put completely into effect" the statute's command that the deficit not exceed the specified maximum. If the Court had applied the proper test, as outlined above, the Comptroller General's making a report (which is preliminary to final action by the United States) should not have been regarded as performing a function which the Constitution requires be performed only by an officer subject to presidential removal. The Comptroller General's report is, to be sure, made pursuant to the command of law (and in this sense, carries out the laws), but it does not actually execute the law in the sense of putting it into final effect. That is left to the President.

Admittedly, Section 252 of Gramm-Rudman-Hollings purports to bind the President to carry out, without modification, the determinations in the Comptroller General's report.<sup>53</sup> But this provision itself is open to serious constitutional challenge. After all, the Constitution vests "[t]he executive Power . . . in a President of the United States."<sup>54</sup> It is doubtful whether a statute may constitutionally require the President to perform an executive act (the final sequestrations) at the behest of another, inferior official, since that would divest the President of a portion of the executive power vested in him by the Constitution. Indeed, in signing Gramm-Rudman-Hollings, President Reagan specifically expressed similar doubts about the authority of the Comptroller General to bind the President.<sup>55</sup>

*Kendall v. United States*<sup>56</sup> is the Supreme Court decision that comes closest to answering the question of whether a statute is constitutional if it purports to bind the President to perform an executive action at the behest of an inferior official. The facts of *Kendall* are complicated<sup>57</sup> and the

52. 2 U.S.C.A. § 902 (West Supp. 1986).

53. 2 U.S.C.A. § 902(a)(3) (West Supp. 1986) ("The [President's] order must . . . incorporate the provisions of the report submitted [by the Comptroller General] under section 901(b) of this title, and must be consistent with such report in all respects. The President may not modify or recalculate any of the estimates, determinations, specifications, bases, amounts or percentages set forth in the [Comptroller General's] report . . .").

54. U.S. CONST. art. II, § 1, cl. 1.

55. Similar constitutional concerns are raised by a provision in the bill authorizing the President to terminate or modify defense contracts for deficit reduction purposes, but only if the action is approved by the Comptroller General. Under our constitutional system, an agent of the Congress may not exercise such supervisory authority over the President.

President's Statement on Signing H.J. Res. 372 Into Law, 21 WEEKLY COMP. PRES. DOC. 1490, 1491 (Dec. 12, 1985).

56. 37 U.S. (12 Pet.) 524 (1838).

57. *Kendall* was a mandamus action against the Postmaster General to require payment of funds due under certain postal contracts. The outgoing Postmaster General had determined that the funds were properly due. His successor sought to reopen the matter and asserted certain adjustments against the claimants. At that point, Congress intervened, passing a special statute that directed another executive official, the Solicitor of the Treasury, to determine the amounts properly due to the claim-

holding is ambiguous, but on at least one construction, the President in some circumstances can be compelled to obey the findings of an inferior official in the Executive branch.<sup>58</sup> At the same time, however, in *dicta* the *Kendall* Court indicated that certain “political duties” must remain subject to presidential supervision and control.<sup>59</sup> A fair reading of *Kendall* leaves unsettled the important constitutional questions of whether the President may be bound to follow orders from an inferior official, and if so under what circumstances.<sup>60</sup> But even if one were to read *Kendall* as definitively resolving that issue for officials within the executive branch, Section 252 of Gramm-Rudman-Hollings presented a potentially distinguishable constitutional issue, since the Comptroller General probably cannot be considered part of the executive branch.

ants. The Solicitor of the Treasury found for the claimants, but the Postmaster General still refused to pay the disputed amounts, claiming that he was “alone subject to the direction and control of the President.” 37 U.S. at 612. Thus, the case could be viewed as presenting the issue whether the decision of an inferior official, the Solicitor of the Treasury, acting pursuant to statute could bind the President and the Postmaster General.

58. The Supreme Court held that a mandamus should issue to compel the Postmaster General to pay the disputed sums, and observed more broadly that “[t]o contend that the obligation imposed on the president to see the laws faithfully executed, implies a power to forbid their execution, is a novel construction of the constitution, and entirely inadmissible.” 37 U.S. at 613. However, the Court was careful to emphasize that it did not view the case as one in which “any such power has been claimed by the President”; rather, the Court maintained, the President had not forbidden the Postmaster General to pay the disputed sums; he had merely submitted a message to Congress urging further consideration of the issue. *Id.* at 613.

59. In *dicta*, the *Kendall* Court proposed the following general framework concerning the President’s power to supervise the actions of other executive branch officials:

The executive power is vested in a President; and so far as his powers are derived from the constitution, he is beyond the reach of any other department, except in the mode prescribed by the constitution through the impeaching power. But it by no means follows, that every officer in every branch of that department is under the *exclusive* direction of the President. Such a principle, we apprehend, is not, and certainly cannot be claimed by the President.

There are certain political duties imposed upon many officers in the executive department, the discharge of which is under the direction of the President. But it would be an alarming doctrine, that congress cannot impose upon any executive officer any duty they may think proper, which is not repugnant to any rights secured and protected by the constitution; and in such cases, the duty and responsibility grow out of and are subject to the control of the law, and not to the direction of the president. And this is emphatically the case, where the duty enjoined is of a mere ministerial character.

*Id.* at 610 (emphasis supplied).

The key word for understanding the narrow holding in *Kendall* is probably “exclusive.” *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803), had already held that officers of the executive branch were not subject to the “exclusive direction” of the President, but subject to judicial control as well. But at the same time that the *Kendall* Court reasserted the power to use mandamus to compel executive branch officials to perform nondiscretionary, “ministerial” duties imposed on them by law, it also recognized that there is an ambit of “certain political duties” within which executive branch officials are subject to presidential direction and control. 37 U.S. at 610. The *Kendall* Court left open how broadly or narrowly these respective spheres are to be defined.

60. For a recent discussion of these issues, see Strauss, *The Place of Agencies in Government: Separation of Powers and the Fourth Branch*, 84 COLUM. L. REV. 573, 607 (1984). See generally Ledewitz, *The Uncertain Power of the President to Execute the Laws*, 46 TENN. L. REV. 757 (1979) (conventional theories of President’s authority to execute laws inadequate to explain current practice).

Thus, the key unsettled issue of constitutional law underlying Gramm-Rudman-Hollings was not in fact raised by Section 251, which merely directs the Comptroller General to prepare a report to the President and Congress; it was instead raised by Section 252, which requires the President to follow that report when making his own sequestrations. Only by implicitly deciding the constitutional issue that the President is indeed bound to follow the Comptroller General's report was the Court in *Bowsher v. Synar* able to convert that report, which was intended to form the basis for later executive action by the President, into executive action itself. Indeed, the Court assumed that the President's action in sequestering funds in response to the Comptroller General's report was a non-discretionary, ministerial act.<sup>61</sup> This reading of the statute is both unwise and dubious as a matter of constitutional law.

### 3. *Ripeness*

Rather than being drawn into premature speculation about how the Comptroller General would exercise his duties under Gramm-Rudman-Hollings, and whether his report would bind the President if at some future time the President disagreed with his interpretation of the statute's requirements, the Court should have invoked the ripeness doctrine to avoid ruling on those issues at this time.<sup>62</sup> The Court should have held simply that the Comptroller General's report was not final executive action because it did not actually sequester funds, and then put off deciding whether the President is bound to follow the Comptroller General's report in making sequestrations of funds until an actual case or controversy

61. 106 S. Ct. at 3192 ("The executive nature of the Comptroller General's functions under the Act is revealed in § 252(a)(3), which gives the Comptroller General the ultimate authority to determine the budget cuts to be made. Indeed, the Comptroller General commands the President to carry out, without the slightest variation . . . the directive of the Comptroller General as to the budget reductions . . ."); *id.* at 3203 (Stevens, J., concurring) ("It is the Comptroller General's Report that the President must follow and that will have conclusive effect.").

62. In a footnote, the *Bowsher v. Synar* majority rejected the argument that "the effect of a removal provision is not 'ripe' until that provision is actually used." *Id.* at 3189 n.5. Following the District Court, the majority held that the challenge to Gramm-Rudman-Hollings was "ripe" because "it is the Comptroller General's *presumed* desire to avoid removal by pleasing Congress, which creates the here-and-now subservience to another branch . . . ." *Id.* at 3189 n.5 (quoting *Synar v. United States*, 626 F. Supp. 1374, 1392 (D.D.C. 1986)) (emphasis supplied). However, "presuming" a here-and-now subservience from the existence of a never-used statutory removal provision is not a responsible way for the Court to perform its function in a sensitive constitutional case if by invoking the ripeness doctrine the Court could have ensured that it would later be in a better position to decide whether the feared subservience had actually materialized.

Moreover, even if the subservience issue could have been considered ripe, the issue of whether the President would be bound to follow the Comptroller General's report clearly was not. The Court's conclusion that the Comptroller General would be performing an "executive" function depended on its assumption that the President would be bound to follow the Comptroller General's report.



properly raised that *issue*.<sup>63</sup> If the President does indeed have constitutional power to refuse to follow the Comptroller General's recommendations, then the challenge to Section 251 of Gramm-Rudman-Hollings clearly would not be ripe for judicial decision until the President acted.

A case illustrating the principle that a recommendation requiring the President's approval before going into effect does not yet present a case or controversy for judicial review is *Chicago & Southern Air Lines, Inc. v. Waterman Steamship Corp.*<sup>64</sup> That case involved a section of the Civil Aeronautics Act that made orders of the Civil Aeronautics Board (CAB) granting certificates to engage in overseas or foreign air transportation subject to approval by the President.<sup>65</sup> The Supreme Court held that the provision requiring presidential approval rendered the CAB's order a mere "recommendation,"<sup>66</sup> which was not subject to judicial review:

Until the decision of the Board has Presidential approval, it grants no privilege and denies no right. . . . To revise or review an administrative decision which has only the force of a recommendation to the President would be to render an advisory opinion in its most obnoxious form . . . .<sup>67</sup>

As in *Waterman Steamship*, if the Comptroller General's report under Gramm-Rudman-Hollings must be adopted by the President before it actually denies rights,<sup>68</sup> then the report should not be regarded as final executive action. Rather, the report is a mere recommendation to the President which is not effective unless and until the President adopts it as the

63. It is important to distinguish between ripeness as it affects a case as a whole and ripeness as it affects a particular issue within the case. Here the National Treasury Union Employees claimed that its members had been denied a pay raise by certain provisions of Gramm-Rudman-Hollings. 106 S. Ct. at 3185. This certainly presents an actual "case or controversy." But the Union should be limited to challenging those aspects of the statute as applied that have actually affected it. See *supra* note 35.

The fact that a case is ripe for adjudication does not mean that every issue that might conceivably be raised is also ripe for resolution. The Supreme Court goes astray by assuming that the President would be bound to follow the Comptroller General's report even if the President disagreed with it. That, however, is an entirely hypothetical controversy that has not yet arisen.

64. 333 U.S. 103 (1948).

65. Civil Aeronautics Act § 601, ch. 601, title VIII, § 801, 52 Stat. 1014 (1938), *repealed by* Act of Aug. 23, 1958, tit. XIV, § 1401(b), 72 Stat. 806 (current version at 49 U.S.C.A. § 1461 (West Supp. 1986)).

66. 333 U.S. at 109.

67. *Id.* at 112-13.

68. The members of the National Treasury Employees Union were not denied their scheduled cost-of-living raise as a result of any action taken by the Comptroller General under Gramm-Rudman-Hollings, but rather because of a sequestration order issued by the President. Thus, while the Union presented a live "case or controversy," it did not fairly encompass the *issue* of whether the President would be bound to follow the Comptroller General's report if he disagreed with it. See *supra* note 38.

basis for his final executive action. To be sure, the statute at issue in *Waterman Steamship* was clear on its face that the CAB's order was effective only if the President approved it, while in *Bowsher v. Synar* the statute purports to require the President to follow the Comptroller General's recommendations for sequestrations.<sup>69</sup> But for present purposes, the point is not so much that the President has clear legal authority to decline to follow the Comptroller General's report as it is that the President's authority one way or the other is *not* clear, although the Court proceeded as if it were.

The Court in *Bowsher v. Synar* could not have legitimately decided that the Comptroller General's report was executive action unless it first decided that the President had no authority to refuse to follow it. The Court should not have decided that important constitutional issue in the absence of a case or controversy in which the President actually asserted the authority to disregard or modify the Comptroller General's recommendations (not to mention in the absence of briefing by the parties and reasoned discussion in the opinion).

The Court in *Bowsher v. Synar* should have held that the challenge to the Comptroller General's role was not yet ripe for review until a situation actually arose in which the Comptroller General reported recommendations for sequestrations that the President was not inclined to accept. Depending on how the Comptroller General exercised his authority, such a situation might never have arisen.<sup>70</sup> If the Comptroller General had acted with the kind of independent professionalism envisioned by Justice White's dissent, future Presidents might never have chosen to join issue with the Comptroller General's interpretation of what Gramm-Rudman-Hollings required; on the other hand, if the Comptroller General's actions in practice had borne out the majority's fear that the Comptroller General would act as the partisan lackey of the legislative branch, then the Court could have addressed the important constitutional issue of whether the Comptroller General's report may bind the President in the context of a concrete case. The experience gained in the interim would have been invaluable to the Court in assessing whether the Comptroller General was performing his functions under Gramm-Rudman-Hollings objectively and

69. See *supra* note 53.

70. The Supreme Court has suggested that "inevitability" may justify the rejection of an argument that a issue is unripe. In *Buckley v. Valeo*, 424 U.S. 1 (1976), the court rejected the contention that a separation of powers challenge to the composition of the Federal Election Commission was not yet ripe by emphasizing the "inevitability" that complainants would be subjected to disputed aspects of the Commission's powers. *Id.* at 114. There was no such "inevitability" justifying a rejection of the ripeness argument in *Bowsher v. Synar*. On the contrary, it is quite plausible that an actual disagreement between the President and the Comptroller General over how to apply the statutory formula to reduce the deficit might never have arisen.

independently, or as a partisan for Congress. Had the Court waited to rule on the Comptroller General's role until a ripe controversy was presented, it would have had available much better information based on the Comptroller General's "track record" in the meantime.

To summarize, the kinds of legislative and historical materials relied on by all the opinions in *Bowsher v. Synar* to assess the character of the Comptroller General's office in the abstract are an extremely unreliable basis on which to predict how the complex institutional arrangements created by Gramm-Rudman-Hollings would have worked in practice. The Court would have been much wiser to hold that these aspects of the case were not ripe until a concrete case arose in which the President actually disputed the Comptroller General's report. At that point, the Court would have been in a better position to determine, in the light of actual experience under the statute, whether the Comptroller General's connections with the legislative branch really were inconsistent with the role he was assigned to play by Gramm-Rudman-Hollings.

There is a second, independent consideration suggesting that a challenge to the Comptroller General's role under Gramm-Rudman-Hollings was not yet ripe. There are strong reasons to believe that the automatic sequestration procedures of sections 251 and 252 of Gramm-Rudman-Hollings were not actually intended to be executed by either the Comptroller General or the President in order to reduce the deficit. Rather, their purpose was to create the threat of an automatic mechanism so unpalatable to all concerned that Congress and the President would be forced to agree on an alternative to avoid the across-the-board sequestrations.<sup>71</sup> If Gramm-Rudman-Hollings had worked as intended, the stage of automatic sequestration by the President would have rarely, if ever, been reached. Consequently, if the Court had held that the challenge to the Comptroller General's role under Gramm-Rudman-Hollings was not ripe until an actual controversy arose between the Comptroller General and the President, the Court might well have been able to avoid unnecessarily (not to mention wrongly) deciding the constitutional issues.<sup>72</sup>

A close reading of the statute reveals that Congress hoped the Gramm-Rudman-Hollings process would never reach the final stage of automatic, across-the-board sequestrations. Section 251(c) provides, for example, that after the Comptroller General's initial report of the program-by-program budget reductions needed to reach the deficit targets, a revised report shall

71. See Kahn, *Gramm-Rudman and the Capacity of Congress to Control the Future*, 13 *HASTINGS CONST. L.Q.* 185, 187, 189 & n.19 (1986).

72. See *Ashwander v. TVA*, 297 U.S. 288, 345 (1936) (Brandeis, J., concurring) (Supreme Court should avoid deciding constitutional issues if case can be resolved on other grounds).

be prepared "indicating whether and to what extent, as a result of laws enacted . . . after the . . . initial report . . . the excess deficit . . . has been eliminated, reduced or increased."<sup>73</sup> Clearly, Congress expected that future Congresses and Presidents would view the cuts threatened in the Comptroller General's initial report as unacceptable and then react by passing a revised budget that would eliminate the need for sequestrations. It seems quite plausible, then, that far from constituting final executive action, the Comptroller General's report to the President and Congress concerning the specific consequences of further inaction on the deficit was actually intended to focus public attention and rally political support for further legislative action that would avoid the draconian, across-the-board budget cuts.

Whatever else might be considered a function that the Constitution confides exclusively to the executive branch, making a public report that focuses political pressure on Congress and the Administration to deal with the deficit is surely not in that category.<sup>74</sup> Whether in practice the Comptroller General's report would have become tantamount to executive action to sequester funds (as the Court assumes), or whether the report would have merely aided the legislative function by focusing public attention and forcing action by the political branches, cannot be determined from the cold words of the statute in advance of any experience under it. The Court should have permitted the process created by Gramm-Rudman-Hollings to go forward by holding that the challenge to the Comptroller General's role was not yet "ripe."

## II. The Consequences of *Bowsher v. Synar*

*Bowsher v. Synar* is now history, and debates about what the Court should have done have become the province of academic articles. The more important issue, now that the Court has rendered its decision, is what effect *Bowsher v. Synar* will have in the future.

Professor Frederick Schauer has pointed out that Supreme Court opinions have effects both "horizontally"—how they affect decisions by Supreme Court decisions in other areas—and "vertically"—how they affect other institutions in the immediate area at issue.<sup>75</sup> The *Bowsher v. Synar* decision has important effects both horizontally and vertically. This Part will first evaluate the horizontal effect of *Bowsher v. Synar* on the

73. 2 U.S.C.A. § 901(c)(1)(A) (West Supp. 1986).

74. See *Buckley v. Valeo*, 424 U.S. at 131 (officers of legislative branch may engage in activities "essentially of an investigative and informative nature" in aid of Congress's legislative functions); *McGrain v. Daugherty*, 273 U.S. 135 (1927) (accord); see also *Barenblatt v. United States*, 360 U.S. 109, 132 (1959) (public exposure is permissible purpose of legislative committee investigation).

75. Schauer, *Opinions as Rules* (Book Review), 53 U. CHI. L. REV. 682 (1986).

Supreme Court's evolving separation of powers jurisprudence. It concludes that while the opinion's implications might have been even worse, *Bowsher v. Synar* presents a side of the current Supreme Court that is simplistic, inflexible, and extremely insensitive to the needs of modern government.

The vertical effect of *Bowsher v. Synar* on efforts to develop legal mechanisms for deficit control will be considered next. The thesis of this section is that *Bowsher v. Synar* was far more damaging to Gramm-Rudman-Hollings than may have appeared. As a result of the Court's untimely intervention, there is virtually no chance that Gramm-Rudman-Hollings will succeed in bringing the deficit under control.

#### A. *Bowsher v. Synar and Separation of Powers Jurisprudence*

A curious ambivalence—even schizophrenia—has characterized the Supreme Court's separation of powers jurisprudence in recent years. Two seemingly inconsistent lines of authority have grown and prospered, evidently untroubled by one another's existence.

On one hand, there are decisions like the Iranian hostage agreement case, *Dames & Moore v. Regan*,<sup>76</sup> or the Watergate tapes case, *Nixon v. Administrator of General Services*.<sup>77</sup> This line of decisions is characterized by a flexible and deferential approach to new institutions which my colleague, Stephen L. Carter, has christened the "evolutionary tradition" in separation of powers cases.<sup>78</sup> More recent examples of this line of cases are *Commodity Futures Trading Commission v. Schor*<sup>79</sup> and *Thomas v. Union Carbide Agricultural Products Co.*,<sup>80</sup> in which the Court pulled back from its insistence in *Northern Pipeline Construction Co. v. Marathon Pipe Line Co.*<sup>81</sup> that only Article III courts could constitutionally resolve traditional, private disputes.

76. 453 U.S. 654 (1981) (President authorized by International Emergency Economic Powers Act to nullify attachments of assets and had power to suspend and terminate claims of American nationals against Iran).

77. 433 U.S. 425 (1977) (regulation of disposition of presidential materials not violation of separation of powers doctrine).

78. S. Carter, *From Sick Chicken to Synar: The Evolution and Subsequent De-Evolution of the Separation of Powers I* (Jan. 1987) (unpublished manuscript on file with the author) (forthcoming in *B.Y.U. L. REV.* (1987)).

79. 106 S. Ct. 3245 (1986) (agency's assumption of jurisdiction over common-law counterclaims does not violate Article III).

80. 105 S. Ct. 3325 (1985) (arbitration provisions of Federal Insecticide, Fungicide, and Rodenticide Act, 7 U.S.C. § 136 (1982), do not violate Article III).

81. 458 U.S. 50 (1982) (Bankruptcy Act of 1978, 92 Stat. 2549 (1978), unconstitutionally conferred Article III judicial powers on bankruptcy judges who at time lacked Article III protections such as lifetime tenure).

At the same time, however, a parallel line of Supreme Court decisions has also developed that Professor Carter calls the "de-evolutionary tradition."<sup>82</sup> These cases typically contain a more literal and absolutist construction of the Constitution and a rhetorical desire to return to the simpler world that the Framers allegedly had in mind when they wrote the Constitution. Examples of the de-evolutionary line are *Buckley v. Valeo*,<sup>83</sup> striking down the composition of the Federal Election Commission, which had been set up in the wake of Watergate to police campaign spending; *INS v. Chadha*,<sup>84</sup> striking down the legislative veto over law-making by executive and administrative bodies; and now, *Bowsher v. Synar*, striking down Congress's attempt to deal with the deficit through Gramm-Rudman-Hollings.

It is not altogether surprising that two seemingly irreconcilable lines of cases would exist simultaneously in separation of powers jurisprudence. A fundamental tension between opposing values underlies, indeed defines, this area of law. One value is the perceived need to adapt governmental institutions to deal with new challenges; the other is "constitutionalism," the idea that the wisdom embodied in our constitutional tradition should constrain actions by current majorities.<sup>85</sup> Where values conflict, law often assumes a pattern of opposed pairs of cases, with the result in one case marking the limit of the principle announced in the other.<sup>86</sup>

What is bothersome about the developing jurisprudence in separation of powers cases is not that the Court sometimes indulges the creation of new institutions and on other occasions strikes them down. Rather, what is bothersome is that the two lines of authority seem to be developing independently, without the Court explaining why it permits some institutional innovations that the Framers never contemplated while it strikes down others.

While the glimmer of a theory to distinguish between the two lines of cases may be emerging,<sup>87</sup> the dualistic quality of the Supreme Court's

82. S. Carter, *supra* note 78, at 1.

83. 424 U.S. 1 (1976).

84. 462 U.S. 919 (1983).

85. See Elliott, *supra* note 24, at 125-26 (1984).

86. Compare, e.g., *Village of Belle Terre v. Boraas*, 416 U.S. 1 (1974) (community may prohibit more than two "unrelated persons" from living together as one household) with *Moore v. City of East Cleveland*, 431 U.S. 494 (1977) (community may not prohibit two cousins and their grandmother from living together as one household by defining them as "unrelated persons").

87. The hint of a possible unifying theory emerges from Justice O'Connor's opinion for the Court in *Commodity Futures Trading Comm'n v. Schor*, 106 S. Ct. 3245 (1986), which upheld the power of the Commission to hear a state law counterclaim. In response to the charge that the Court's more flexible interpretation of separation of powers principles was at war with the spirit of its recent decision in *Bowsher v. Synar*, Justice O'Connor responded: "Unlike *Bowsher*, this case raises no question of the aggrandizement of congressional power at the expense of a coordinate branch." 106 S. Ct. at 3261. This is an odd understanding of *Bowsher v. Synar*, since the true effect of Gramm-Rudman-Hollings was to restrain future Congresses. See Kahn, *supra* note 71, at 188-90. But leaving

separation of powers decisions cautions against overemphasizing the implications of any single decision. *Bowsher v. Synar* represents only part of the story, a facet rather than the totality of the Court's views. Nonetheless, certain possible implications from *Bowsher v. Synar* do emerge for other issues.

### 1. *The Constitutional Status of "Independent" Agencies*

The most celebrated issue raised in *Bowsher v. Synar* is one that the Court explicitly declined to decide: the constitutional status of the "independent" regulatory agencies.<sup>88</sup> In a footnote, then-Chief Justice Burger's opinion for the majority specifically disavowed that the decision "cast[s] doubt on the status of 'independent' agencies because no issues involving such agencies are presented here."<sup>89</sup>

The concurrence by Justices Stevens and Marshall went further, asserting that it is "well settled that Congress may delegate legislative power to independent agencies . . . ."<sup>90</sup> Indeed, the concurrence's novel theory that *Chadha* applies to "agents" of Congress<sup>91</sup> may be seen as an attempt to create logical space between the Comptroller General, who may not be given lawmaking powers because he is an agent of Congress, and "independent" agencies, which may receive delegations of lawmaking authority because they are not "agents," but something else.<sup>92</sup> (If this was indeed one of the concurrence's purposes, the choice of the word "agent" may prove to be unfortunate; it may be difficult to argue later that an "agency" is not an "agent.")

Although it could have been worse—for example, if the Court had reinvigorated the dormant "delegation doctrine" to invalidate Gramm-

aside for the moment whether the Court correctly categorized the issue in *Bowsher*, Justice O'Connor's statement does offer some promise for understanding when the Court invokes its tough "de-evolutionary" approach as opposed to its more lenient "evolutionary" analysis. Recent cases such as *Chadha* (and even *Northern Pipeline*) in which the Court struck down Congress's statutory creations can be understood as resistance of the Court against what it perceived (rightly or wrongly) as an attempt by Congress to expand its own power.

88. The concept of an "independent" agency is poorly defined. It generally means one whose members are protected from removal by the President except upon grounds prescribed by statute. See *generally* *Humphrey's Executor v. United States*, 295 U.S. 602 (1935) (holding statute may constitutionally limit President's power to remove FTC commissioner to specified "cause" and acknowledging existence of independent agencies).

A possible reason that the Court did such a poor job of analyzing the Comptroller General's actual functions under Gramm-Rudman-Hollings, see *supra* text accompanying notes 36-50, is that the primary attention of the Justices was focused on the effect of their decision on the problem of the constitutionality of independent agencies.

89. 106 S. Ct. at 3188 n.4.

90. 106 S. Ct. at 3205 (Stevens, J., concurring).

91. See *supra* text accompanying notes 18-24.

92. But see 106 S. Ct. at 3215 n.1 (Blackmun, J., dissenting) (suggesting that concurrence's "agency" theory may, but should not, cast doubt on status of independent agencies).

Rudman-Hollings<sup>93</sup>—no one should draw much comfort from the majority's assurance that the status of the independent agencies was not before the Court. The tenor of the Court's opinion, as well as its rationale and mode of analysis, is anything but promising for the argument that Congress has broad authority under the necessary and proper clause to create a variety of governmental institutions such as independent agencies.<sup>94</sup>

It is hard to believe that the Court would actually strike down such an established feature of our legal universe as the independent agency.<sup>95</sup> But the inexorable logic of "de-evolutionary" separation of powers decisions like *Bowsher v. Synar* seems headed in that direction. If all institutions of government must be "in" one of the three branches, it is hard to imagine the independent agencies "in" any branch other than the executive.<sup>96</sup> It is also hard to imagine what it means to be "in" the executive branch if an institution is not subject to presidential supervision and control, and *Bowsher v. Synar* seems to equate the removal power with control.

But do not write off the independent agency too quickly just because the logic of decisions like *Bowsher v. Synar* seems headed in that direction. There is more to law than logic, as Justice Holmes reminded us in his famous aphorism.<sup>97</sup> And in recent years this Supreme Court has had a high tolerance for logical contradiction when it comes to leaving prior results in effect, while undermining their logical foundations in its current decisions.<sup>98</sup>

93. In a footnote, the *Bowsher v. Synar* majority stated that it had "no occasion for considering appellees' other challenges . . . including their argument that the assignment of powers to the Comptroller General . . . violates the delegation doctrine . . . ." 106 S. Ct. at 3193 n.10. The District Court rejected the delegation doctrine argument. *Synar v. United States*, 626 F. Supp. 1374, 1389 (D.D.C. 1986).

94. But see Steele & Bowman, *The Constitutionality of Independent Regulatory Agencies Under the Necessary and Proper Clause: The Case of the Federal Election Commission*, 4 YALE J. ON REG. 363 (1987) (arguing for constitutionality of Federal Election Commission under necessary and proper clause). The author of this Article is himself sympathetic to the argument that the necessary and proper clause empowers Congress to create independent agencies. See Elliott, *supra* note 24, at 142-43, 175.

For other discussions of the issue of independent agencies, see *The Uneasy Status of the Administrative Agency*, 36 AM. U.L. REV. 277 (1987); Miller, *Independent Agencies*, 1986 SUP. CT. REV. 41 (1986).

95. See Elliott, *supra* note 24, at 173 ("[I]t is hard to imagine any proposition of constitutional law more firmly established de facto than that law can be made by administrative institutions acting under broad delegations.").

96. But see Sommer, *Independent Agencies as Article I Tribunals: Foundations of a Theory of Agency Independence*, 39 ADMIN. L. REV. 83 (1987) (suggesting that independent agencies should be conceived as "legislative courts" created by Congress under Article I).

97. O. W. HOLMES, *THE COMMON LAW* 5 (1881) ("The life of the law has not been logic: it has been experience.").

98. See *THE BURGER COURT: THE COUNTER-REVOLUTION THAT WASN'T* (V. Blasi ed. 1983) (citing examples).



Perhaps this Court is capable of finding a comfortable resting place in the notion that independent agencies are not “independent” at all, but rather firmly ensconced “in” the executive branch, while at the same time ignoring the implications of *Bowsher v. Synar* and adhering to the holding of *Humphrey’s Executor*<sup>99</sup> that the President may not remove their incumbents except on the terms prescribed by Congress.

## 2. Congressional Oversight

Not only does *Bowsher v. Synar* raise doubts about the ultimate fate of the independent agencies, but it also shows the Court’s willingness to extend *Chadha* to restrict still further Congress’s power to supervise and influence the exercise of broad discretionary authority it has delegated to administrative decisionmakers. While the techniques that Congress historically has used to supervise the execution of delegated powers are diffuse and often informal, recent scholarship suggests that, at least in some contexts, they have been remarkably effective.<sup>100</sup>

In *Chadha*, the Court stated: “Congress must abide by its delegation of authority until that delegation is legislatively altered or revoked.”<sup>101</sup> Even critics of the *Chadha* opinion did not believe that the Court intended its statement to be read literally as invalidating Congress’s established “oversight” functions over administrative decisionmakers to whom it had delegated broad powers.<sup>102</sup> However, in *Bowsher v. Synar*, the majority expansively restated its *Chadha* holding: “However, as *Chadha* makes clear, once Congress makes its choice in enacting legislation, *its participation ends. Congress can thereafter control the execution of its enactment only indirectly—by passing new legislation.*”<sup>103</sup> This seems to say that any attempt by Congress to influence the exercise of delegated powers, except for passing new legislation, is an unconstitutional interference in the affairs of the executive branch. Of course, because Congressional oversight is generally informal, the courts would find it difficult in practice to police this rule. But the consequence of even adopting the principle that Congress may not attempt to influence the exercise of powers which it has delegated would be a breathtaking change in the structure of the “administrative state” that has evolved since the New Deal. In the long run, the

99. *Humphrey’s Executor v. United States*, 295 U.S. 602 (1935).

100. See, e.g., Weingast & Moran, *Bureaucratic Discretion or Congressional Control?: Regulatory Policymaking by the Federal Trade Commission*, 91 J. POL. ECON. 765 (1983) (presenting empirical evidence of Congressional control of FTC to support hypothesis of legislative control of independent agencies).

101. 462 U.S. at 955.

102. See, e.g., Elliott, *supra* note 24, at 141 (treating as “recognized” congressional power to engage in oversight); see also *Chadha*, 462 U.S. at 955 n.19 (“The Constitution provides the Congress with abundant means to oversee and control its administrative creatures.”).

103. 106 S. Ct. at 3192 (emphasis supplied).

Court's step-by-step contraction of Congress's power to influence the actions of administrative decisionmakers may be far more significant than the Court's ultimate resolution of the controversy over whether independent agency officials can be insulated from removal by the President.

### 3. *Framework Statutes and Shared Powers*

During Warren Burger's tenure as Chief Justice, the Supreme Court seemed determined to categorize all functions of government into three simple categories: legislative, executive, and judicial.<sup>104</sup> Although scholars have long criticized this "pigeonhole" jurisprudence as an unenlightened way to approach the problem of marrying the needs of modern government to the theory of separation of powers,<sup>105</sup> the Court continues to insist that every institution it meets must reside "in" one of the three branches. The geometric metaphor<sup>106</sup> that a particular institution is "in" one of three "places" then becomes a substitute for further judicial thought (often a scarce commodity).

The Court's formalistic, pigeonhole approach is particularly unsatisfactory when it confronts a situation which does not fit neatly into either the executive or the legislative function, but rather involves both branches in joint or shared activity. Sequestering budgeted funds is surely an example of a power which is not clearly assigned by the Constitution to either the President or Congress. The Constitution itself nowhere mentions "sequestration," a process developed only recently. In the early 1970's, President Nixon claimed inherent constitutional authority to sequester or impound appropriated funds.<sup>107</sup> The Supreme Court, however, unanimously rejected the President's assertion of the right to impound funds, albeit on narrow statutory grounds, in *Train v. New York*<sup>108</sup>—a case which is not

104. A few Justices throughout our history have rejected the simplistic concept that every government action must fit neatly into one of the three traditional boxes. For example, Justice Holmes's dissent in *Springer v. Philippine Islands*, 277 U.S. 189, 209 (1928), recognized that a government function did not fit tightly within one of the three branches, but rather could be part of an "indiscriminate residue of matters within legislative control." *Id.* at 212. Similarly, Justice Stevens, concurring in *Bowsher v. Synar*, had no difficulty with the related idea that a "legislative" function could be assigned to an "executive" official. 106 S. Ct. at 3201-02 (Stevens, J., concurring). However, such feats of conceptual subtlety have never been able to command a majority of the Court.

105. See J. LANDIS, *THE ADMINISTRATIVE PROCESS*, 47-49 (1938) (rejecting rigid, three-branch analysis of government functions); Strauss, *supra* note 60, at 578-80, 667 ("rigid separation-of-powers compartmentalization of government functions should be abandoned in favor of analysis in terms of . . . checks and balances.").

106. For a general exploration of the influence of metaphors drawn from geometry on legal thought, see Hoeflich, *Law & Geometry: Legal Science from Leibniz to Langdell*, 30 AM. J. LEG. HIST. 95 (1986).

107. For a discussion of the impoundment controversies of the early 1970's, see Abascal & Kramer, *Presidential Impoundment, Part I: Historical Genesis and Constitutional Framework*, 62 GEO. L.J. 1549 (1974).

108. 420 U.S. 35 (1975); see also *Local 2677, Am. Fed'n of Gov't Employees v. Phillips*, 358 F.

even deemed relevant by any of the opinions in *Bowsher v. Synar*. Although the President's constitutional authority to impound funds remained undecided, as a practical matter this controversy was resolved by enactment of the Congressional Budget and Impoundment Control Act of 1974, which gives the President limited authority to sequester funds, subject to certain legislative controls.<sup>109</sup>

This history of compromise establishes a strong case for the proposition that sequestration of funds should be regarded as neither purely "executive" nor purely "legislative" in character, but rather an instance of a "shared power."<sup>110</sup> In the realm of shared powers, where more than one branch has a role to play,<sup>111</sup> the practice in recent years has been to resolve inter-branch controversy by passing "framework" statutes which codify and regulate the roles of respective institutions.<sup>112</sup> Congress has passed a number of these statutes including the War Powers Resolution<sup>113</sup> and the Impoundment Control Act of 1974,<sup>114</sup> both of which define procedures to be followed in areas of shared powers between the executive and legislative branches.

The Supreme Court has never clearly resolved the constitutional status of framework statutes in areas of shared powers, and *Bowsher v. Synar* did little to clarify the law on this point. In evaluating a framework statute in an area of constitutionally-shared powers, the Court should not ask conceptually (as the majority does in *Bowsher v. Synar*) whether a particular act in isolation is "executive" or "legislative" in character. Rather, as Justice White points out forcefully in his *Bowsher* dissent,<sup>115</sup> the Court should evaluate the statutory framework as a whole to determine whether it is a reasonable implementation of the original constitutional balance between the branches, or "whether [it] disrupts the proper balance between the coordinate branches."<sup>116</sup>

Supp. 60 (D.D.C. 1973) (rejecting presidential claim of constitutional authority to impound).

109. 2 U.S.C. § 683 (1982).

110. See generally *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 635 (1952) (Jackson, J., concurring) (presidential authority is at its maximum when acting pursuant to express or implied authorization by Congress).

111. I have argued elsewhere that the war power is such a shared power, which can be exercised only by two branches acting together, since the Constitution makes the President Commander in Chief, but assigns Congress authority to raise and support armed forces. See Elliott, *supra* note 24, at 156 n.151.

112. See *supra* notes 10-11.

113. 50 U.S.C. §§ 1541-1548 (1982).

114. 2 U.S.C. §§ 631-642 (1982).

115. 106 S. Ct. at 3214-15 (White, J., dissenting) ("[T]he role of this Court should be limited to determining whether the Act so alters the balance of authority among the branches of government as to pose a genuine threat to the basic division between the lawmaking power and the power to execute the law.").

116. *Nixon v. Administrator of Gen. Servs.*, 433 U.S. 425, 443 (1977); see also Strauss, *supra* note 60, at 605 (although "rigid separation-of-powers arguments" are "unserviceable," "the checks-and-balances idea retains force.").

Measured by these standards, the sequestration procedures in Sections 251 and 252 of Gramm-Rudman-Hollings could have been construed to create a reasonable framework for accomodating both the executive and the legislative role. Even assuming (as the Court did) that the Comptroller General is a representative of the legislative branch, rather than independent, the Court could still have preserved a significant negotiating position for the executive by raising doubts about the constitutionality of binding the President to follow the Comptroller General's report.

That the Court declined to view the sequestration procedures in this way, and instead stepped in to strike them down, is symptomatic of the current Court's hostility toward statutory creations that do not fit neatly into its three boxes: legislative, executive, and judicial. Unfortunately, the realities of complex, modern government cannot easily be accommodated to the Court's simplistic conceptualization.

An important mark of judicial maturity, as Justice Holmes pointed out long ago, is an awareness that legal rules do not have ineffable existences independent of the purposes for which they were created. The reasons behind rules should define their reach and application.<sup>117</sup> The constitutional principle of separation of powers was intended to serve as a bulwark against "abuse of power."<sup>118</sup> In deciding separation of powers cases, as in other areas of law, the Supreme Court should not apply legal concepts mechanistically without regard to consequences. Rather, the Justices should always keep in perspective the ultimate goals that a particular legal concept was created to serve.

Unfortunately, the sense of perspective which distinguishes the wise judge seems to have been lost in *Bowsher v. Synar*. As a practical matter, the Comptroller General of the United States does not represent a serious, incipient threat to our liberties. In striking down Gramm-Rudman-Hollings over the role assigned to the Comptroller General, *Bowsher v. Synar* bought us little, if anything, in terms of the values that the separation of powers doctrine was intended to protect, and did so at a high cost in terms of the damage inflicted on the effort to control the deficit.

#### B. *Bowsher v. Synar and the Deficit*

The "vertical" effect of *Bowsher v. Synar* on efforts to develop legal mechanisms for managing the deficit is also significant. A casual reader of the majority opinion in *Bowsher v. Synar* might get the false impression that invalidating the Comptroller General's role under Section 251 was

117. Holmes, *Law in Science and Science in Law*, 12 HARV. L. REV. 443, 460 (1899).

118. *Bowsher v. Synar*, 106 S. Ct. at 3191.

not a body blow to Gramm-Rudman-Hollings, because the statute creates a "fallback" provision.<sup>119</sup> Under the fallback, Congress itself may pass a joint resolution specifying the sequestrations that are needed to meet the deficit targets.<sup>120</sup> However, the impression that Gramm-Rudman-Hollings is "alive and well" because Congress can still perform for itself the function that was formerly delegated to the Comptroller General is mistaken. This view badly misunderstands the nature of Congress<sup>121</sup> and the peculiar problems that Gramm-Rudman-Hollings was designed to overcome.

### 1. *Gramm-Rudman-Hollings as a Regulatory Statute*

Congress is not a single entity, but rather a complex institution composed of 535 elected members and a large staff bureaucracy, all with divergent goals and agendas. As a result, it is not easy to get Congress to overcome its institutional inertia. Moreover, it is difficult to design a statute that can force Congress to act. Congress may pass a statute declaring that it must act to eliminate the deficit (as it did in 1984<sup>122</sup>), and then ignore its self-imposed mandate (as it did in 1985 with the goals it had set in 1984<sup>123</sup>). These problems are exacerbated when the necessary action is particularly unpopular.

Gramm-Rudman-Hollings was brilliantly designed to overcome these problems. As my colleague Paul Kahn has pointed out in a provocative article,<sup>124</sup> Gramm-Rudman-Hollings is really a *regulatory* statute. "What

119. See, e.g., 106 S. Ct. at 3193 ("Fortunately, this is a thicket we need not enter . . . Congress has explicitly provided 'fallback' provisions in the Act . . .").

120. Gramm-Rudman-Hollings created so-called "fallback provisions" that take effect "[i]n the event that any of the reporting provisions described in section 901 [§ 251]. . . are invalidated." 2 U.S.C.A. § 922(f)(1) (West Supp. 1986). In place of the Comptroller General, the fallback provisions constitute a "Temporary Joint Committee on Deficit Reduction," comprising the entire membership of the budget committees in both houses of Congress. 2 U.S.C.A. § 922(f)(2) (West Supp. 1986). This body is supposed to prepare a report, in lieu of the report of the Comptroller General, which sets out the program-by-program spending reductions which would be necessary to meet the maximum deficit targets. 2 U.S.C.A. § 922(f)(3) (West Supp. 1986). If—but only if—this report is then passed as a joint resolution by both houses of Congress it becomes the basis for sequestrations by the President under § 252. 2 U.S.C.A. § 922(f)(5) (West Supp. 1986).

In reality, then, there is little difference between the "fallback provisions" and Congress passing an ordinary statute mandating that the President make across-the-board cuts in previously appropriated funds. Thus, the "fallback provision" lacks the "automatic" character that was crucial if Gramm-Rudman-Hollings was to work. See *infra* text accompanying notes 128-32.

121. Lawyers generally misperceive the nature of Congress because they are in the habit of personifying the institution as a single, coherent lawmaking intelligence. See Elliott, Ackerman & Milian, *Toward a Theory of Statutory Evolution: The Federalization of Environmental Law*, 1 J. LAW, ECON. & ORG. 313, 319 (1985).

122. Deficit Reduction Act of 1984, Pub. L. No. 98-369, 98 Stat. 494 (1984) (to be codified in scattered Titles of U.S.C.); H.R. REP. NO. 432, 98th Cong., 2d Sess. 1094.

123. Schiller, *Gramm-Rudman: Toothless Dragon*, N.Y. Times, Feb. 6, 1986, at A23, col. 3.

124. Kahn, *supra* note 71, at 185.

Gramm-Rudman regulates," writes Professor Kahn, "is future legislation."<sup>125</sup>

To see the full implications of Professor Kahn's insight,<sup>126</sup> consider the nature of "regulation" as a legal technique. Our concept of regulation, which developed as our compromise between capitalism and socialism, is a distinctively American institution. Although leaving control of the means of production in private hands, the state intervenes in more subtle ways to influence the conduct of private enterprises. The essential defining characteristic of regulation is that while preserving the nominal freedom of individuals to make private decisions, regulation attempts to alter the course of decisions in the aggregate by altering the structure of incentives individuals face when making their decisions.<sup>127</sup>

Gramm-Rudman-Hollings was a regulatory statute in just this sense. Like other classic regulatory regimes, Gramm-Rudman-Hollings left individual regulated parties (members of Congress) nominally free to make individual decisions, but simultaneously tried to shape the collective course of their decisions by altering incentives. In Professor Kahn's words:

Controlling future legislative behavior is the essence of the [Gramm-Rudman-Hollings] Act. . . . Congress has set a rule for

125. *Id.* at 190.

126. Unfortunately, Kahn himself does not fully develop his insight that Gramm-Rudman-Hollings is a regulatory statute. Instead, he goes on to argue that Gramm-Rudman-Hollings is an unconstitutional attempt by a "present Congress [to] stipulat[e] limits on what [a] future Congress can do in the absence of repeal." *Id.* On this point, the present author must respectfully part company.

In the first place, Gramm-Rudman-Hollings is not merely action by "one Congress"; it is a statute, and therefore it stands on a different juridical footing in our system than would action by Congress alone. See *Chadha*, 462 U.S. at 919 (action by majority of Congress alone cannot make law). This is one feature that distinguishes our system from systems such as the British in which Parliament is sovereign, see *Finer, Introduction: The Five Constitutions and the British Constitutional Framework* in *FIVE CONSTITUTIONS* 12, 35 (S. Finer ed. 1979), and therefore one Parliament cannot bind another. See G. WILSON, *CASES AND MATERIALS ON CONSTITUTIONAL AND ADMINISTRATIVE LAW* 225 (2d ed. 1976) (sovereignty of Parliament is sovereignty " 'for the time being' and any . . . [Parliament] can repeal a statute made by one of its predecessors"; traditional doctrine holds Parliament cannot "even impose some special condition or clog on a repeal").

More fundamentally, however, Kahn is incorrect in portraying Gramm-Rudman-Hollings as a "limit" on action by future Congresses. As he himself points out, the actual effect of the statute is to alter the incentives that influence future legislation without actually limiting the freedom of a future Congress to do anything it wants (including repeal the statute). It cannot be, however, that any statute that may influence future legislative behavior by altering political incentives is therefore unconstitutional. Consider, for example, a statute which stipulated that congressional elections would be held on April 16, the day after most people file their federal income tax returns. Such a statute might very well alter political incentives, and thereby influence future congressional voting on spending and revenue measures, but it would not be unconstitutional for that reason.

127. The regulatory taxes and health warnings currently applied to cigarettes are classic examples of a distinctively regulatory approach to a problem: People remain legally free to smoke, but by increasing the price, and reminding people of the costs to their health, the state attempts to discourage consumption. National policy regarding cigarettes is ambivalent, however, since agricultural subsidies simultaneously stimulate tobacco production. As with cigarettes, regulation is typically adopted in lieu of more forceful legal techniques when competing or contradictory values must be accommodated.

itself—incur no deficit beyond the stipulated maximum—and to enforce it has adopted a strategy for dealing with violations that sets a penalty—the automatic, across-the-board spending reduction—which is both unattractive and simultaneously keeps the enterprise of deficit reduction from collapsing.<sup>128</sup>

Under Gramm-Rudman-Hollings, if Congress did not conform its actions to the deficit targets (or repeal them), other institutions would automatically sequester funds. Since automatic sequestrations would produce unpleasant political consequences, the threat of these sequestrations was the “stick” which it was hoped might change political behavior in the future.

No one knows—and after *Bowsher v. Synar*, no one ever will know—whether this approach would have succeeded in altering the behavior of future Congresses. What is clear, however, is that, to have any realistic chance of effectively altering the behavior of future Congresses, the distinctive nature of Congress requires that two conditions be met: (1) there must be a sanction if Congress fails to reduce the deficit, (2) the sanction must be automatic, in that it must not require Congress to take affirmative action to punish itself.

Gramm-Rudman-Hollings met both of these conditions, and consequently, there was a reasonable chance that the statute might actually have worked. The sanction was the threat that, if Congress failed to reduce the deficit, the budget would be cut across the board, which would be politically unpopular. The sanction was automatic since the cuts would have gone into effect without any further action by Congress.

## 2. *The Effect of Bowsher v. Synar*

*Bowsher v. Synar* destroyed the automatic character of the sanction, by requiring Congress to take affirmative action to impose any sanction for its own failure to meet the deficit reduction targets. This converted Gramm-Rudman-Hollings into a hortatory goal statute, like the Deficit Reduction Act of 1984,<sup>129</sup> which Congress is free to—and almost certainly will—disregard in the future when it becomes convenient to do so.

To be sure, the mere existence of Gramm-Rudman-Hollings with its stipulated deficit reduction targets has some effect. Exceeding the targets will undoubtedly produce some mild political fallout. But it will be extremely difficult to hold any particular member of Congress (or the

128. Kahn, *supra* note 71, at 186-87.

129. Deficit Reduction Act of 1984, Pub. L. No. 98-369, 98 Stat. 494 (1984) (to be codified in scattered Titles of U.S.C.).

President) responsible, since by definition the deficit is the composite result of all spending and revenue decisions.

Thus, by invalidating the portion of Gramm-Rudman-Hollings that provided for an institution outside of Congress to impose sequestrations if Congress did not meet the deficit targets through its regular spending and revenue decisions, the Court in *Bowsher v. Synar* destroyed the "central genius"<sup>130</sup> of the statute—the fact that "Gramm-Rudman-Hollings . . . d[id] not require Congress to *do* anything to cut the deficit; if Congress fails to act, cuts go into effect 'automatically.'"<sup>131</sup>

From this perspective, the decision in *Bowsher v. Synar* emerges as destructive, self-defeating and self-contradictory. The decision is destructive because Gramm-Rudman-Hollings was gutted, with little or no practical benefit in terms of separation of powers values. The decision is self-defeating because the outcome will actually worsen the situation that supposedly concerned the Court. The essence of the majority's complaint in *Bowsher v. Synar* was that an officer too closely aligned with Congress, the Comptroller General, was given the task of making the sequestration report to the President. After the Court's decision, however, that task now falls to Congress itself. Finally, the decision is self-contradictory in that the *Bowsher v. Synar* Court does not explain why a task too executive to be performed by an officer aligned with Congress, the Comptroller General, suddenly ceases to be executive at all when it is performed instead by Congress.<sup>132</sup>

### III. Regulating the Deficit

*Bowsher v. Synar* may not make sense, but the result is now the law. That restores to the national agenda a question that only a few months ago Gramm-Rudman-Hollings appeared to have temporarily put behind us: What legal mechanisms can be devised to control the federal deficit?

This Part approaches that question in three steps. The first section considers the possibility of amending the Constitution to deal with the deficit. While constitutional change may come later, today the necessary political conditions for constitutional change do not exist. There is not yet a widespread consensus that the causes of the deficit are inherent in the *structure* of our political institutions; most people either still deny that the deficit is a serious problem, or attribute it to errors by the people in office. The second section argues that the deficit's causes are indeed built into the structure of our present political institutions. One cause, which is particu-

130. Elliott, *supra* note 9, at 1099.

131. *Id.*

132. 106 S. Ct. at 3201 (Stevens, J., concurring).



larly relevant because it would be relatively easy to change,<sup>133</sup> is the structure of voting in Congress. Voting separately on spending, taxes, and the size of the deficit provides Congress with little incentive to reach rational choices. As the history of previous measures to control the deficit illustrates, better integration of the decisions on taxes, spending, and the size of the deficit is needed if we are to control our fiscal affairs. In the third section, the concept of "Dependent Taxation and Budgeting in Arrears" is proposed as a possible structural reform.

## A. Constitutional Regulation of the Deficit

In theory, the best way to regulate spending and revenue decisions after *Bowsher v. Synar* might be a constitutional amendment. Constitutional change to deal with the deficit might take a variety of forms, ranging from the crude remedy of the Balanced Budget Amendment<sup>134</sup> to more subtle forms of institutional change. Like Gramm-Rudman-Hollings, more subtle changes would not prohibit deficits outright, but would attack them indirectly by changing the incentives for decisionmakers.<sup>135</sup>

133. Obviously a large number of factors come together to produce the deficit, from historical changes in our society's conception of the proper role of the federal government to changes in the position of the U.S. in the world economy. From a legal standpoint, however, the relevant cause of the deficit should be considered the factor that "could be most easily controlled." Calabresi, *Concerning Cause and the Law of Torts: An Essay for Harry Kalven, Jr.*, 43 U. CHI. L. REV. 69, 105-06 (1975).

134. The following resolution introduced in the 99th Congress incorporates the essential features of the different versions of the so-called Balanced Budget Amendment:

SECTION 1 Prior to each fiscal year, the Congress shall adopt a statement of receipts and outlays for that year in which total outlays are not greater than total receipts. The Congress may amend such statement provided revised outlays are not greater than revised receipts. Whenever three-fifths of the whole number of both Houses shall deem it necessary, Congress in such statement may provide for specific excess outlays over receipts by a vote directed solely to that subject. The Congress and the President shall ensure, pursuant to legislation or through exercise of their powers under the first and second articles, that actual outlays do not exceed the outlays set forth in such statement.

SECTION 2 Total receipts for any fiscal year set forth in the statement adopted pursuant to this article shall not increase by a rate greater than the rate of increase in national income in the year or years ending not less than six months not more than twelve months before such fiscal year, unless a majority of the whole number of both Houses of Congress shall have passed a bill directed solely to approving specific additional receipts and such bill has become law.

SECTION 3 Prior to each fiscal year, the President shall transmit to Congress a proposed statement of receipts and outlays for that year consistent with the provisions of this article.

SECTION 4 The Congress may waive the provisions of this article for any fiscal year in which a declaration of war is in effect.

SECTION 5 Total receipts shall include all receipts of the United States except those derived from borrowing and total outlays shall include all outlays of the United States except those for repayment of debt principal.

SECTION 6 The Congress shall enforce and implement this article by appropriate legislation.

SECTION 7 This article shall take effect for the second fiscal year beginning after its ratification.

S.J. Res. 5, 99th Cong., 1st Sess., 131 CONG. REC. S335 (daily ed. Jan. 3, 1985).

135. Elsewhere I have suggested modifying the terms of election to the Senate as an example of

Elsewhere I have argued against the Balanced Budget Amendment, but in favor of a constitutional convention to consider more subtle forms of constitutional change that would restructure our political institutions to make them better able to deal with the deficit.<sup>136</sup> I will not repeat those arguments here. It must be acknowledged, however, that we no longer seem on the verge of constitutional revision to address the deficit. The enactment of Gramm-Rudman-Hollings took some of the steam out of the movement to call a constitutional convention. In addition, as the economy has improved, the public seems less concerned than it was a few years ago that large federal deficits are on the verge of causing economic ruin.

These developments can be put into perspective by considering a theory of constitutional revision proposed recently by Professor Bruce Ackerman. According to Professor Ackerman, true constitutional change occurs only during infrequent "constitutional moments," when an aroused citizenry demands changes in the fundamental legal order. "We the People" then lapse back into the somnolence of "normal politics," in which politicians are relatively free to go about their business unencumbered by interference from the public.<sup>137</sup> According to Professor Ackerman, past examples of constitutional moments include the American Revolution, the Civil War, and the New Deal.<sup>138</sup>

Ackerman's description of American political history rings true, but as yet he has told us relatively little about what characterizes a constitutional moment. One factor (among others) is surely important: a general public perception that problems are *structural*, rather than merely political in nature. The perceived source of problems, not their seriousness, distinguishes true constitutional moments from normal politics. During periods of normal politics, the perceived solution to the country's problems is to "throw the rascals out"—to use elections to replace people who have been making wrong decisions with people who will make better decisions. A constitutional moment, on the other hand, begins when people realize that throwing the rascals out will not suffice; the problem is no longer perceived as solvable merely by replacing the people in authority. Rather, the structure of authority itself must be changed.

institutional change that would affect the deficit indirectly by changing incentives. Elliott, *supra* note 9, at 1105-06. In the same spirit others have suggested closer ties between the legislative and the executive. See, e.g., Cutler, *To Form a Government* (1980), reprinted in REFORMING AMERICAN GOVERNMENT: THE BICENTENNIAL PAPERS OF THE COMMITTEE ON THE CONSTITUTIONAL SYSTEM 11-23 (D. Robinson ed. 1985) [hereinafter REFORMING AMERICAN GOVERNMENT].

136. Elliott, *supra* note 9.

137. Ackerman, *The Storrs Lectures: Discovering the Constitution*, 93 YALE L.J. 1013, 1022 (1984).

138. *Id.* at 1051-52.

When (and if) a substantial majority of the American people become convinced that the problem of the deficit transcends whether the Republicans or the Democrats control Congress or the White House, or even which candidates are elected in the next presidential election, then we will be on the verge of constitutional change to control the deficit. But constitutional change is unlikely until there is a general consensus that the deficit is caused by flaws in the structure of our institutions that affect whoever is exercising power. The necessary awareness that the causes of the deficit are built into our political institutions is beginning to develop, but we have not yet reached a true constitutional moment in Ackerman's terms. This can be illustrated by contrasting recent statements by prominent political figures.

David Stockman, a former member of Congress, served as Director of the Office of Management and Budget from 1981 to 1985. Always a controversial figure, Stockman engineered the Reagan Administration's program of cutting domestic spending. Upon leaving government, Stockman wrote an equally controversial book, *The Triumph of Politics*, which is his personal account of why the war on the deficit was lost.<sup>139</sup> Fascinating reading for anyone interested in the deficit, the book describes Stockman's efforts to cut spending and the political forces that consistently frustrated those efforts, sometimes partially, sometimes completely.

At the end of *The Triumph of Politics*, one might expect Stockman to be resigned to the fact that the triumph of politics over economic policy is endemic to American political institutions. Surprisingly, however, in his final chapter, hope springs eternal in David Stockman's breast that things could have been different, and will be different, if only politicians will stop acting like politicians:

Our budget is now drastically out of balance not because this condition is endemic to our politics. Rather, it is the consequence of an accident of governance which occurred in 1981. That it persists is due to the untenable anti-tax position of the White House. After five years of presidential intransigence, all of the normal mechanisms of economic governance have become ensnared in a web of folly. But this condition can be remedied whenever the White House decides to face the facts of life.<sup>140</sup>

In imagining that the fiscal events of the last few years could have been otherwise if only certain people in high office had behaved differently,<sup>141</sup>

139. D. STOCKMAN, *THE TRIUMPH OF POLITICS: THE INSIDE STORY OF THE REAGAN REVOLUTION* (1987).

140. *Id.* at 426.

141. This is not the place to refute Stockman's naive hope that it is merely an "accident of governance" that the politicians who have risen successfully through our political system favor spending and oppose taxes.

Stockman provides a prototypical example of viewing the deficit in terms of "normal politics": The source of the problem is the people in authority, not the structure of authority itself.

So long as most people interpret events as Stockman does, we will not reach a constitutional moment. Unless and until we become convinced that people in office behave as they do because of the institutional structures in which they operate, we will blame the particular people in office, not the structure of institutions.

An example from the opposite end of the spectrum is a recent letter to the editor of the *Washington Post* by former Senator J. William Fulbright, who writes:

It is difficult for me not to believe, in view of our recently becoming the world's largest debtor with the world's largest domestic deficit and the largest deficit in our balance of trade, that the other democracies [in which legislatures select the principal executive officials] are better organized to manage these affairs than we are.<sup>142</sup>

In attributing our economic problems, including the deficit, to the organization of our political institutions, Fulbright exemplifies a view of the deficit that must be broadly held before constitutional change to deal with the deficit can occur.

A growing number of thoughtful people agree with Fulbright that the causes of the deficit (and the deeper economic problems that it symbolizes) lie not in the transient politics of the moment but go deeper into the very structure of our political institutions. Former White House Counsel Lloyd Cutler and former Secretary of the Treasury C. Douglas Dillion recently formed the "Committee on the Constitutional System" to discuss and publicize the idea that many of our problems are traceable to the structure of our constitutional system. "The deadlock over the deficit" is cited in the Committee's papers as a primary "indication that the problems [are] structural, rather than personal, and seem likely to persist, no matter who wins various electoral contests."<sup>143</sup>

Creating a political consensus for institutional reform at the constitutional level is the purpose of the Committee on the Constitutional System, but it will be a long and arduous process. In 1985, I imagined that if efforts to deal with the deficit "continue[] for the next decade as [they] ha[ve] for the last, with politicians posturing and attempting to shift re-

142. Fulbright, *The Executive Should Be Chosen By Congress*, Wash. Post, Mar. 7, 1987, at A22, col. 3.

143. REFORMING AMERICAN GOVERNMENT, *supra* note 135, at 1.

sponsibility to one another, but without any real reform . . . [,] many more of us will be prepared to consider the possibility that the deficit is merely the surface symptom of a more fundamental imbalance in our political institutions which cannot be remedied short of some form of constitutional change."<sup>144</sup> If anything, it was overly optimistic to think that a consensus for constitutional change could emerge within a decade.

In the meantime, it is important for several reasons to explore legal mechanisms for dealing with the deficit short of constitutional change, even if one is convinced that some form of constitutional change is ultimately necessary. First, since constitutional change may not be in the offing, it would be irresponsible to fail to use the tools at hand. Second, Gramm-Rudman-Hollings illustrates that it may be possible to change institutional incentives without amending the Constitution.<sup>145</sup> Third, pursuing available statutory remedies may be the most effective way to hasten constitutional change in the long run. Just as the failures of the Articles of Confederation laid the groundwork for the Constitutional Convention of 1787, a history demonstrating clearly that our present institutions are simply incapable of managing the deficit (and the deeper economic and political problems that it symbolizes) is a necessary step toward building the political consensus for our next constitutional moment.

### B. *The Rules of the Legislative Game and the Deficit*

The design of possible statutory changes to remedy an out-of-control deficit depends on first developing a theory of institutional causes of the deficit that can be addressed by statute.<sup>146</sup> Outgoing Senator Charles Mathias Jr. provides the starting point for such a theory. Senator Mathias, a veteran of eighteen years in the Senate and eight years in the House, was asked by a newspaper interviewer recently, "How well is the system functioning?" He answered:

Well, we've got a \$2 trillion national debt, we've got a \$200 billion trade deficit, we've got a \$220 billion budget deficit. We've got problems. And that has to reflect some miscalculations in the system. So the answer I would have to give you is, no, it's not working the way it ought to work . . . .<sup>147</sup>

144. Elliott, *supra* note 9, at 1097.

145. See *id.* at 1097. It should be noted, however, that the lesson to be learned from Gramm-Rudman-Hollings is ambiguous. After all, the Supreme Court did hold that the institutional changes made by that statute could not be made without amending the Constitution.

146. See *supra* note 133.

147. Mathias, *Reflections on a System Spinning Out of Control*, Wash. Post, Dec. 11, 1986, at A21, col. 2.

Later in the same interview, Senator Mathias expanded on this theme:

The system doesn't work. You know, the Constitution, as I see it, was based on the principle that people would be rational. They would employ the reason that God gave them. And when they don't, the Constitution doesn't work very well. Just for example, you can look at the roll call. *There were people who voted for the tax cut in '81, and against the budget cuts. Just expose that to the light of day a little bit and you see why we're headed into this kind of trouble that we are in.*<sup>148</sup>

Senator Mathias assumes that something must be wrong with the system, but he is unable to diagnose what it is. He is right that in voting on fiscal matters, legislators do not appear to be using "the reason that God gave them." What he does not see is that the organization of our political system creates strong incentives for politicians who face frequent elections to behave irresponsibly on fiscal matters, and little or no countervailing incentives to act in accordance with "the reason that God gave them."

This is not the time or place to attempt a full account of the incentives that operate on members of Congress, a topic that is already the subject of a voluminous literature in political science.<sup>149</sup> It suffices to say that, to the limited extent that issues affect congressional elections at all, voters are more sensitive to whether they agree with their representatives' "stands" on a few high-visibility issues than they are to the results of government policy as a whole.<sup>150</sup> Thus, while voters may pay some attention to whether they agree with the way their representative voted on certain isolated issues, such as raising their taxes or cutting their food stamps, they generally do not hold their representatives individually responsible for the overall results of government policy such as the deficit.

Consequently, discipline on fiscal matters must come from the internal structure of Congress, rather than the electoral process.<sup>151</sup> In the past,

148. *Id.* at A21, col. 3 (emphasis supplied).

149. See, e.g., M. FIORINA, CONGRESS: KEYSTONE OF THE WASHINGTON ESTABLISHMENT (1977); D. MAYHEW, CONGRESS: THE ELECTORAL CONNECTION (1974).

For representative works that analyze the specific problem of the deficit from this standpoint, see A. WILDAVSKY, HOW TO LIMIT GOVERNMENT SPENDING (1980); J. BUCHANAN & R. WAGNER, DEMOCRACY IN DEFICIT: THE POLITICAL LEGACY OF LORD KEYNES (1977); Elliott, *supra* note 9.

150. M. FIORINA, *supra* note 149, at 41-45 (voters do not hold "their" representatives responsible for actions of government as whole).

151. Public concern about the "deficit issue" can, however, create political conditions for structural reforms such as Gramm-Rudman-Hollings. Further research is needed to decide how changing political incentives may lead to broad, public interest legislation. For the suggestion that the threat of a constitutional convention created a "politicians' dilemma" that led to the passage of Gramm-Rudman-Hollings, see Elliott, *supra* note 9, at 1103-04. See also Mashaw, *A Comment on Causation, Law Reform, and Guerilla Warfare*, 73 GEO. L.J. 1393, 1396 (1985) (plaintiffs' victories in toxic tort cases may mobilize industry to lobby for statutory reform).

aggregations of power such as strong political parties, and the seniority system in Congress provided some discipline, but in recent years, these structures have eroded.<sup>152</sup> The possibility of reform should focus on the internal structure of Congress. Under the traditional voting rules of Congress, legislators vote *seriatim* on spending, revenue, and deficit decisions, treating them as if they were separate, unrelated issues. There is no procedure requiring votes to reflect a consistent fiscal policy, or to trade off competing objectives.<sup>153</sup> Given the rules of this game, in which each vote is independent of every other vote, it is perfectly rational (in terms of the rules of the game) for legislators to vote in favor of eliminating the deficit, but in favor of increasing spending, and also in favor of cutting taxes. The way the issues are framed is: "Do you prefer a smaller deficit to a larger deficit?"; "Do you prefer more or less spending on worthwhile programs such as hospitals and schools?"; "Do you prefer larger or smaller taxes on your constituents?" When the issues are put that way, most legislators probably would vote in favor of (1) eliminating the deficit, (2) cutting taxes, and (3) increasing federal spending.

Contrary to Senator Mathias' views, there is nothing irrational or inconsistent about holding all three of these goals simultaneously *as preferences*. The problem arises if it is not possible to achieve all three in practice. What is irrational is the existence of a legislative decision procedure that does not subordinate votes about preferences to the dictates of practical reality. Absent a procedure to coordinate votes on separate spending and revenue decisions, it is predictable (perhaps even inevitable) that a thousand small decisions will reach an outcome that is different from what would have been preferred on the aggregate issue.<sup>154</sup> Rather than allowing issues to be addressed *seriatim*, decision procedures should reflect the fact that a decision on one issue has consequences for others.

Of course, as Senator Mathias intimates, legislators' intuitions may tell them that it is impossible to obtain a lower deficit, lower taxes, and higher spending, but experience demonstrates that this factor alone is too weak to discipline voting. Only if the decision procedure mirrors the constraints imposed by reality can we expect the outcome to maximize the achievement of our shared goals.

152. See Elliott, *supra* note 9, at 1101-02.

153. The institutional inertia of Congress imposes a certain obligation to trade off competing goals in that not everything that an individual would like can be passed. However, the situation is still a "plus sum game," rather than the division of a fixed pie. If two politicians agree to vote for each other's pet projects, they are both better off, without regard to whether the country can afford both at once.

154. See generally Schelling, *Micromotives and Macrobbehavior*, in *MICROMOTIVES AND MACROBEHAVIOR* 9 (T. Schelling ed. 1978) (rational responses by individuals to micromotives can lead to non-desirable situations at collective level).

While the perverse incentives generated by congressional voting procedures have not attracted explicit attention in previous accounts of the causes of the deficit, the major reforms directed at controlling the deficit in recent years—the Congressional Budgeting and Impoundment Control Act of 1974<sup>155</sup> (“1974 Budget Act”) and Gramm-Rudman-Hollings in 1985—may be understood as attempts, albeit imperfect ones, to alter the rules of the legislative “game” of voting on budgetary decisions.

Under the 1974 Budget Act, Congress first enacts comprehensive budget resolutions to set spending targets. In theory, the sum of individual spending measures is supposed to stay within these limits. Thus, the 1974 Budget Act attempts to convert congressional votes on spending programs from a “plus sum game,” in which individual members of Congress benefit more by spending more, into a “zero sum game,” in which each spending program has to compete with every other spending program for the limited pool of resources fixed by the budget resolution.

The changes initiated by the 1974 Budget Act were a step in the right direction, but they did not succeed. First, the procedure established by the 1974 Budget Act failed to establish a pool of resources that was actually finite and fixed. The aggregate spending goals eventually became merely totals of the spending programs authorized by appropriations committees in various areas, rather than acting as genuine constraints.<sup>156</sup> In addition, the 1974 Budget Act was deficient in that it only partially integrated congressional votes on budgetary matters: While the 1974 procedure purported to aggregate spending votes through the budget resolutions, voting on revenue matters was not tied to the results of votes on the budget resolutions. Thus, under the rules of the legislative game as modified by the 1974 Budget Act, it remained rational for a member of Congress to vote for aggregate spending of \$800 billion and taxes of only \$600 billion, even though he or she also opposed a deficit. Spending and revenue decisions remained de-coupled.

Gramm-Rudman-Hollings built on the reforms of the 1974 Budget Act but carried them a step further. First, like the 1974 Budget Act, it attempted to establish a zero sum game on the spending side by establishing deficit targets over five years. Gramm-Rudman-Hollings went beyond the 1974 Budget Act, however, by creating a more credible mechanism for

155. 2 U.S.C. §§ 631-642 (1982). For a good summary of the history and provisions of the 1974 Congressional Budget Act, see A. SCHICK, CONGRESS AND MONEY: BUDGETING, SPENDING AND TAXING 17-18, 307-414 (1980).

156. See Schick, *The First Five Years of Congressional Budgeting*, in *THE CONGRESSIONAL BUDGET PROCESS AFTER FIVE YEARS* 3, 27 (R. Penner ed. 1981) (“Those who wanted the congressional budget to be a contest over national priorities have been greatly disappointed.”).



enforcing the aggregate targets, namely the automatic sequestration procedures of Sections 251 and 252.

In addition, Gramm-Rudman-Hollings was the first budgetary reform to link votes on spending and revenues, although this linkage remained indirect. The aggregate limits under the 1974 Budget Act took into account only spending, not revenues. Under Gramm-Rudman-Hollings, however, the aggregate amount of spending that Congress permitted itself was also a function of its revenue decisions. Because the aggregate targets under Gramm-Rudman-Hollings were not just spending limits (as in the past), but deficit targets, they implicitly took into account revenue as well. Thus, the new rules of the congressional voting game at least implicitly placed votes on reducing taxes in competition with votes on raising spending.

To be sure, under Gramm-Rudman-Hollings the linkage between taxing and spending operated only on Congress as whole, not on the votes of individual members. This was a material deficiency, since correct incentives for action by a collective body, such as Congress, do not necessarily equate with correct incentives for the body's individual members who actually make the decisions.<sup>157</sup> Nonetheless, for the first time, a zero sum game for voting was created which mirrored the zero sum game between spending, revenues, and taxes. If Congress were to vote to increase spending, it would be forced to face the fact that either the deficit would increase or taxes would have to be raised. For the first time, all three terms of the equation—spending, revenues, and deficit—were linked.

From the standpoint of altering incentives for congressional voting behavior, however, Gramm-Rudman-Hollings did suffer from serious deficiencies. One was that the linkage between taxes and spending was attenuated and indirect. When voting on particular spending programs, members of Congress were not simultaneously taking a position on raising taxes. Because Gramm-Rudman-Hollings operated prospectively, based on *predictions* about the revenues that would be raised under the existing tax system, the system incorporated uncertainty which allowed politicians to adopt inconsistent positions without appearing to do so. One could still vote for spending programs but against taxes to pay for them without admitting to the public (or to one's self) that the deficit would be increased.

Thus, while in theory Gramm-Rudman-Hollings created a zero sum voting game among spending, taxes, and deficit, in practice it did not. Because projections of future governmental revenues are indefinite and highly sensitive to assumptions made about the future health of the econ-

157. See Schelling, *supra* note 154, at 17-18, 307-414.

omy, a great deal of discretion, flexibility, and, for politicians, room to deny the laws of arithmetic, was built into the Gramm-Rudman-Hollings system.<sup>158</sup>

A final deficiency in the incentive structure established by Gramm-Rudman-Hollings is that it did not establish true parity between spending reductions and tax increases as alternative methods for meeting the deficit targets. Gramm-Rudman-Hollings took the projected level of federal revenues as given, and modified the level of spending to meet the deficit targets. As a matter of arithmetic, however, the size of the deficit is affected equally by either spending reductions or tax increases. By creating a mechanism for automatic spending reductions, but requiring a very visible vote to raise taxes, Gramm-Rudman-Hollings biased the outcome toward reducing spending rather than increasing taxes to meet the targets.

In fairness, Gramm-Rudman-Hollings did not prohibit Congress from meeting the deficit targets by raising taxes, rather than by reducing spending. The threat by the Reagan Administration to veto any tax increase, however, made that approach theoretical rather than practical in the near term.

### C. *A Modest Proposal: Dependent Taxation and Budgeting in Arrears*

These deficiencies in past attempts to revise the rules of the legislative voting game point the way to possible reforms. The goal guiding reforms should be to create a system of rules for aggregating congressional votes which mirrors the actual effect of government decisions. In particular, the fact that the level of the deficit is dependent on the aggregate levels of spending and revenues should be built into the legislative decision procedure.

Various procedures can be imagined which would meet this goal. One possibility is outlined below. It is called "Dependent Taxation and Budgeting in Arrears" and is built on two key premises:

- (1) once appropriate deficit targets are established, spending decisions should be linked to revenue decisions.
- (2) actual figures, not estimates, should form the basis for computations of the deficit and spending reductions or tax increases.

The essence of Dependent Taxation and Budgeting in Arrears is that decisions by Congress and the President about a tolerable level for the

158. Thus, in some instances, the Comptroller General's role under § 251 is not merely ministerial, but encompasses a great deal of discretion; this is probably the reason that Congress has been unwilling to amend Gramm-Rudman-Hollings in the wake of *Bowsher v. Synar* to give the § 251 powers originally assigned to the Comptroller General to an official of the executive branch, such as the Director of the Office of Management and Budget.

deficit and the proper level of government spending should *imply* a rate of taxation.<sup>159</sup> In other words, rather than viewing the amount of revenues to be generated as a separate decision to be made by Congress each year, Congress should acknowledge that by deciding the size of the deficit and the amount of spending, it has already determined the necessary level of taxation—hence, the term “Dependent Taxation.”

To implement this program, Congress could amend the tax code to provide that all existing taxes rates for the coming year would be uniformly raised or lowered pro rata through an administrative proceeding to levels which would have been sufficient to meet the deficit targets for a preceding year. Thus, tax rates for 1988 would be indexed to the deficit for 1987.

Alternatively, spending decisions could be indexed to the amount of revenue actually raised. Practical problems of planning government programs might make it more desirable, however, to link future taxes to actual spending, rather than the other way around, so that tax rates rather than spending levels would fluctuate. From the perspective of changing congressional voting incentives, however, it does not matter whether spending is linked to taxes, or taxes are linked to spending; the important point is that decisions on one side of the fiscal equation should automatically affect the other.

The primary advantage of this procedure is that it would force Congress and the President to acknowledge the arithmetic relationship between deficits, spending, and revenues.<sup>160</sup> In addition, since computations would be based on actual experience in a preceding year, discretion to “cook the books” to avoid the relationship among the three would be reduced (although, admittedly, not eliminated).

159. A somewhat similar concept was suggested by Franco Modigliani, Professor of Economics and Finance at the Massachusetts Institute of Technology, in testimony about Gramm-Rudman-Hollings before Congress's Joint Economic Committee. *The Gramm-Rudman Budget Proposal: Hearings Before the Joint Economics Comm.*, 99th Cong., 1st Sess. 37 (1985) (statement of Franco Modigliani).

160. I am not unaware that Keynesians (and “supply-siders”) maintain that the true relationship between spending and revenues is not strictly arithmetic, because under certain conditions, deficits may stimulate the economy, thereby producing greater revenues to the government through the income tax. However, this effect should be counterbalanced by the government's running a surplus when the economy is “overheated” during periods of high inflation. It seems impractical to modify congressional voting rules depending upon the state of the economy. Therefore, it seems better to adopt voting procedures which are fiscally neutral rather than biased for or against deficits. It should be noted, however, that nothing in what I call “zero sum game” voting rules would preclude a conscious decision to run a deficit for macro-economic reasons. The problem I am addressing in the text is the opposite: where the conscious decision would be not to have a deficit (or to have only a smaller deficit), but voting procedures build in incentives to deviate from the aggregate decision in the results of a series of individual votes.

A subsidiary, but not trivial, advantage is that the suggested procedure would be constitutional. It has long since been settled that fixing the level of a tax or tariff may be delegated to administrative officials in the executive branch.<sup>161</sup> Congress has been understandably unwilling to give a political official in the executive branch the power, originally delegated to the Comptroller General by Gramm-Rudman-Hollings, to make discretionary estimates of future deficits. Similar concerns should not, however, attend giving an administrator in the executive branch the function of computing the pro rata increase or decrease in marginal rates of taxation necessary to meet the deficit targets for a preceding year. Judicial review would be available to insure that administrative decisionmakers adhered to the legislative standard in fixing rates.

Another practical, political advantage of the Dependent Taxation and Budgeting in Arrears approach is that it does not prejudice the controversial political issue of whether spending reductions or tax increases should be used to meet deficit targets. Rather, it simply establishes the priority of the statutory deficit targets (which are, of course, subject to repeal or modification).

Like Gramm-Rudman-Hollings, Dependent Taxation and Budgeting in Arrears is a regulatory approach that attempts to alter the political incentives for Congress and the President in making future budgetary decisions, rather than eliminate their discretion to decide on the appropriate deficit level. In contrast to the proposed Balanced Budget Amendment, the suggested Dependent Taxation and Budgeting in Arrears approach would not tie the hands of the government in fiscal policy. The proposal rests on the premise that if a politician advocates spending a certain amount of money, he or she should be forced to acknowledge that either taxes or the deficit will increase by an equivalent amount. If we wish to retain the flexibility to make discretionary decisions about the level of the deficit for macroeconomic reasons, we should decide on the level of the deficit first, but then we should tie tax rates to the level of spending. Therefore, in place of the "stick" of automatic spending reductions, which the Supreme Court held unconstitutional in *Bowsher v. Synar*, the proposal for Dependent Taxation and Budgeting in Arrears substitutes the threat of automatic, across-the-board tax increases.

The proposed statute is not a panacea; it only attempts to redress perverse incentives created by rules for congressional voting on fiscal matters. While these rules may contribute to the deficit, there is no reason to believe that they are its only or primary cause. Other factors inherent in our

161. *Hampton & Co. v. United States*, 276 U.S. 394 (1928) (Congress can delegate its power to fix level of customs duties).

political institutions also bias the political process in favor of deficits, and the measures suggested here will do nothing to redress those imbalances. Because so many factors interact to produce the deficit, it is difficult, if not impossible, to predict the ultimate success of any reform directed at one of a multiplicity of causes. The fact remains, however, that the approach suggested here might be a step worth taking. Such a step would be major and undoubtedly requires further study and refinement. But those who would reject it out of hand as politically impractical should consider that only a few years ago the proposals adopted as Gramm-Rudman-Hollings would have seemed equally visionary.

### IV. Conclusion: Framework Statutes and the Constitution

From almost any perspective, the Supreme Court's opinion in *Bowsher v. Synar* is a disappointment. For many different reasons, Gramm-Rudman-Hollings was significant legislation. It was passed to deal with a major national crisis. It adopted a new and creative approach to regulating the deficit. It raised interesting and important constitutional issues of the first magnitude.

Unfortunately, however, the Court's opinion does not reflect these factors. Instead, the Court invalidated the statute on a technicality. Perhaps the Court was wise to avoid deciding the real issues. Courts do not sit for the purpose of writing opinions that satisfy the curiosity of law professors. On the other hand, from the standpoint of constitutional history and the evolution of our governmental institutions, *Bowsher v. Synar* raises more questions than it answers.

Professor Kahn's article<sup>162</sup> defines the real issue better than the Court's opinion does: "the capacity of Congress to control the future" through statutes.<sup>163</sup> By my lights, however, Kahn misstates the issue and reaches the wrong conclusion. The question is not really whether one Congress may control a future Congress; it is rather whether the United States government as a whole may *regulate* its future operations by statute, or alternatively, whether the only legal procedure that may validly perform this function is a constitutional amendment.

In my view, both as a matter of prudent policy and constitutional law, statutes that create a framework to regulate the future operations of government should be recognized as valid, provided they supplement rather than alter the original constitutional design. When Congress passes a framework statute, it is acting under the necessary and proper clause to

162. Kahn, *supra* note 71.

163. *Id.* at 186, 188.

supplement the original constitutional assignment of functions, and its handiwork should be upheld unless it violates “the letter” or “the spirit” of the Constitution.<sup>164</sup>

“We act through governmental institutions which are rightly revered for their age and admired for their adaptability,” write Harold Edgar and Benno Schmidt.<sup>165</sup> The central challenge of our separation of powers jurisprudence is to maintain the wisdom we revere in our constitutional tradition without sacrificing the adaptability we need in our governmental institutions.

Regrettably, *Bowsher v. Synar* contributes nothing to that enterprise.

164. *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316 (1819) (Marshall, C.J.).

165. Edgar & Schmidt, *Curtiss-Wright Comes Home: Executive Power and National Security Secrecy*, 21 HARV. C.R.-C.L. L. REV. 349, 350 (1986).